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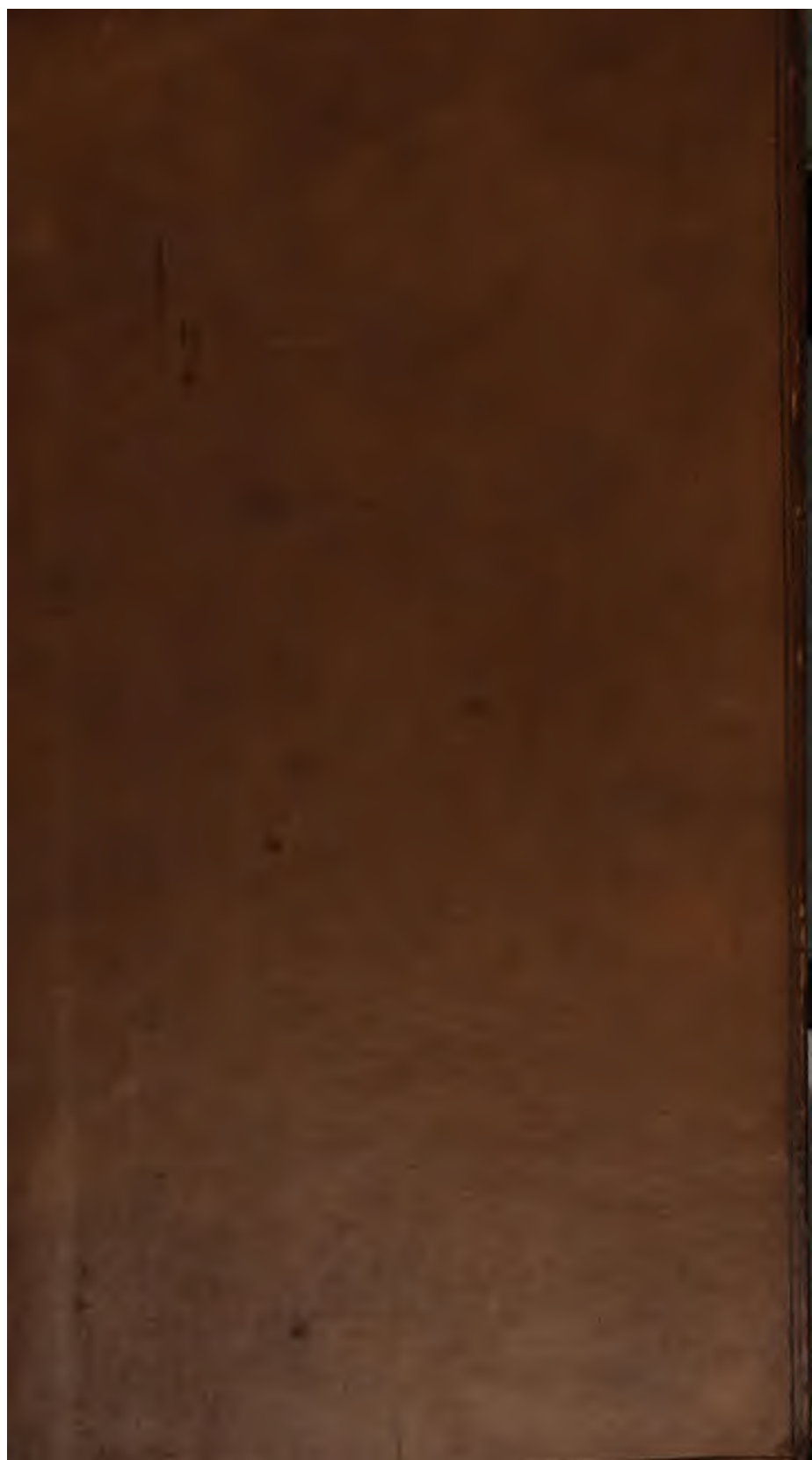
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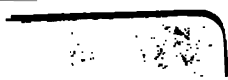



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8^o Jur. A. 14. 75.

A
TREATISE
ON
THE LAW
OF
TITHES.

1917

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1927

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A
PRACTICAL
T R E A T I S E
ON
THE LAW
OF
T I T H E S.

By JOHN MIREHOUSE,
OF LINCOLN'S INN, AND THE INNER TEMPLE, ESQ.
BARRISTER AT LAW.

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A
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A

PRACTICAL TREATISE

ON THE

Law of Tithes,

PART THE FIRST.

CHAP. I.

Definition of Tithes. — Of the Classes into which they have been divided.

TITHES are the tenth part of the produce arising from land, from the stock upon land, and from the personal industry of the inhabitants. Definition of tithes.

They have hence been divided into three classes — predial, mixed, and personal.

Predial tithes, so called from *prædium*, a farm, are those which arise immediately from the soil, either with or without the intervention of human industry; as, of corn, hay, hemp, flax, grass, fruit, herbs, and wood. ⁽¹⁾ Predial tithes.

(¹) 2 Inst. 649. Norton v. Cod. 663. Bally v. Wells, 3 Clarke, Gwm. 428. Scarr. v. Wils. R. 30. Degge, c. 1. 215. Trin. Coll. 3 Anstr. 760. Gibs. Ayl. Par. Jur. Can. Ang. 506.

**Mixed
tithes**

Mixed tithes are those which are produced mediately through the increase or other produce of such animals as receive their nutriment from the earth and its fruits; as of cattle, sheep, pigs, wool, milk, and eggs.⁽¹⁾

**Personal
tithes.**

Personal tithes are those which arise entirely from the labour of man, being the tenth of the clear gain of his industry, his charges and expenses, according to his estate or degree, being deducted; as of mills and fish.⁽²⁾

**Great and
small tithes.**

In addition to this triple distinction, all tithes have been otherwise divided into two classes, great or small: the former, in general, comprehending the tithes of corn, peas, and beans⁽³⁾, (which were anciently garbed or bound in sheaves,) hay, and wood; the latter, all other predial, together with all personal and mixed tithes.⁽⁴⁾

**Great or
small, ac-
cording to
their nature.**

Tithes are great or small, according to the nature of the things which yield the tithe, without

(1) 3. Salk. 347. 1 Roll. Abr. 523. 1 Roll. Abr. 656. Abr. 685. 2 Inst. 649 Lind. de Dec. 188.

Per Macdonald C. B., in (3) Sims v. Bennett, Gwm. Scarr. v. Trin. Coll. Gwm. 874.

1445. (4) Gibs. Cod. 663. 2 Wood's (2) 2 Inst. 621. Carleton Inst. L. E. 162. 2 Wood. v. Brightwell, 2 P.Wms. 462. Vin. Lect. 22. 90. Dandridge v. Johnson, Cro.

reference to the quantity. ⁽¹⁾ Thus clover-grass made into hay is of the nature of all other grass made into hay, and consequently is a great tithe; but, if left for seed, its nature becomes altered, and, like other seed, it becomes a small tithe. ⁽²⁾ Neither the manner or place of cultivation, nor the time of gathering, as has been formerly supposed, makes any alteration in its denomination. The inquiry is to be confined to the question, whether the nature remains the same; for on that alone the rule depends. ⁽³⁾ Discussions have arisen on these points; it has been argued that all garden-tithes are of a distinct and different description; that every renewal within the small compass of a garden, even wheat itself, when sown there, should yield a small tithe. If, however, a root were to be called a small tithe when planted in a garden, and a great tithe when planted in a field, there would be great confusion and variation in the tithes of every parish every year. The nature of crops admits of a definite description: their quantity is always liable to dispute; therefore the law, which aims at certainty, adopts the above-mentioned rule; and, in

⁽¹⁾ *Sims v. Bennet*, 7 Bro. P. C. 29. 2d edit. by Tomlins, and 1 Ed. R. 382. *Wharton v. Leslie*, 3 Salk. 349. *Mosely*, 909.

⁽²⁾ *Wallis v. Pain*, 2 Com.

R. 634. *Bunb.* 344. *Pomfret v. Lander*, Gwm. 530.

⁽³⁾ *Smith v. Wyatt*, 2 Atk. R. 364. *Gumley v. Birt*, *Bunb.* 169. *Steers v. Brasier*, Gwm. 742. *Hodgshon v. Smith*, *Bunb.* 279.

direct subservience to it, it seems now settled, although in contradiction to some respectable authorities ⁽¹⁾, that all personal and mixed tithes, as well as hops ⁽²⁾, flax ⁽³⁾, potatoes ⁽⁴⁾, turnips ⁽⁵⁾, herbs, apples, and fruit ⁽⁶⁾, cole-seed ⁽⁷⁾ clover-seed ⁽⁸⁾, rape-seed ⁽⁹⁾, saffron ⁽¹⁰⁾, teazels ⁽¹¹⁾, thyme, and tobacco ⁽¹²⁾, are small tithes, however large the quantity in which they may be cultivated.

⁽¹⁾ Udall v. Tindall, Cro. Car. 28. Hut. R. 77. Wharton v. Lisle, 3 Lev. 365. Skin. 341. & 356.

⁽²⁾ Crouch v. Ridsen, 1 Vent. 61. 1 Sid. 443. 2 Keb. 612. Franklyn v. Master and Brethren of St. Cross, Bunb. 78.

⁽³⁾ Wharton v. Lisle, 4 Mod. 184. 12 Mod. 41. Skin. 341.

⁽⁴⁾ Smith v. Wyatt, 2 Atk. 364.

⁽⁵⁾ Beaumont v. Shilcot, Gwm. 944.

⁽⁶⁾ Listerv. Foy, Gwm. 579.

⁽⁷⁾ Fish v. Wimberley, Gwm. 533.

⁽⁸⁾ Wallis v. Pain, 2 Com. Rep. 634.

⁽⁹⁾ Robinson v. Brooke, Gwm. 471.

⁽¹⁰⁾ Bedingfield v. Feake, Cro. Eliz. 467. Moore, 909. 1 Roll. Abr. 643. Dean and Chapter of Norwich, Ow. 74. Gouldsb. R. 149.

⁽¹¹⁾ Hunt v. Codrington, 1 Wood's Dec. 391.

⁽¹²⁾ Knight v. Halsey, Gwm. 1557.

CHAP. II.

Of the original Payment of Tithes—To whom they are due, as between Rector, Vicar, and Curate.—Of Portions of Tithes.—Of Glebe Lands.—Of Tithes in Extra-parochial Places.

SECTION I.

Of the original Payment of Tithes.—To whom they are due, as between Rector, Vicar, and Curate.

ON the first introduction of tithes, as there were no parishes, there was no parish priest who could claim them: the *parochia* was the diocese or episcopal district in which the bishop and his clergy lived; and the tithes and oblations of religious persons, being esteemed holy, and pertaining only to God and the church, were brought to the cathedral, the place of residence both of the bishop and his clergy. ⁽¹⁾

Of the original payment and distribution of tithes.

All the tithes that were received throughout the bishoprick went into a common treasury: one part was apportioned for the maintenance of the ministry, out of which every minister had his

The quadripartite division of tithes.

⁽¹⁾ Bishop of Winchester's Case, 2 Rep. 446. Gibs. Cod. 662. Seld. c. 9. § 3. Benton v. Trot, Moore, 530. Kennett on Imp. 1. 2. Ayl. Par. Jur. Can. Ang. 167. Doct. and Stud. 337. 18 ed. Slade v. Drake, Hob. R. 296.

salary ; another for the relief of the poor, sick, and strangers ; a third for the reparation of churches ; and a fourth for the bishop himself.⁽¹⁾ The bishop, who made this quadripartite division*, claimed all the tithes throughout his diocese ; but finding it difficult to collect them, in consequence of the inconvenience to persons who lived at a great distance from the choir, he began to send out missionaries into the towns and villages within his diocese to preach, and to receive the dues belonging to the see. These were for the most part itinerant preachers, who returned to their episcopal abode, and rendered an account both of their labours and profits: others, more zealous, by degrees built chapels and churches, which were consecrated by the bishop ; who, at his discretion, defined the boundaries within which they might receive their tenths, and exercise their spiritual vocations.⁽²⁾ As devotion increased, kings built places of worship in the vicinity of

⁽¹⁾ Seld. c. 6. § 3. Ayl. Par. Jur. Can. Ang. 394. Hist. of Craven by Whitaker, 5. Bede, Eccl. Hist. G. Ang. 358. Wheloc. Can. Ælfrici, 132. 24. Mirr. c. 1. 14. Steel v. Houghton, 1 Hen. Bl. R.

51. 63. Colt and Glover v. Bishop of Coventry, Hob. R. 148.

⁽²⁾ Kennett on Imp. 3. Spelm. Concil. Brit. 53. Bed. Hist. Eccl. l. 4. c. 27.

* This quadripartite division is said to have been prescribed by Simplicius Bishop of Rome, anno 472. It was expressly confirmed in the Council of Nantes, anno 658 ; and Aventinus represents it as the common practice of the Western Church. *Kennett.*

their palaces for themselves and their courts; and laymen, and lords of manors having large possessions, began to erect churches on their estates for their families and tenantry (¹), having the right of patronage given to them by way of compensation or encouragement for their endowments. (²) The minister, however, still resided, and officiated only by the bishop's delegation: as the tenant was admitted to the possession of the land under an oath of fidelity to the lord, so the priest was admitted under an obligation of obedience to the bishop; as the former paid a rent for his occupation, so the latter rendered a part of the profits of the place where he exercised his sacred functions to his bishop, as a remuneration for the secure enjoyment of the remainder. (³)

But notwithstanding every church, with the profits arising therefrom, was thus subject to the disposition of the bishop as the only immediate superior, lay patrons were soon taught to think it highly laudable to surrender up the tithes of their possessions to some neighbouring religious house, and suffer them to be appropriated thereto. The patron on these occasions was in the practice of delivering at the altar the key of the church,

Origin of appropriations.

(¹) 3. Inst. 203. Seld. c. 9. | Inst. 120. a. Arthington v.
 § 4. 1 Inst. 17. 6. | Bishop of Chester, 1 H. Bl.
 R. 423.
 (²) Hist. of Par. of Whalley by Whittaker, 38. Hist. | (³) Kennett's Imp. 9. Seld.
 of Craven by Whit. 5. 1 | c. 6. § 3.

Why so
called.

a horn, a knife, or candlestick, as a public token of his surrender, returning thence well satisfied with the assent and benediction of the holy person presiding over the monastery. ⁽¹⁾ The incumbent served the church, and received the tithes and profits accruing to it, for the use only of the monastery ⁽²⁾; which was in the nature of a mother-church to the surrounding country, and generally presented one of its own body to perform the functions of religion. The tithes and churches, thus appropriated to religious houses, were called appropriations, either from the words generally made use of, *appropriamus, consolidamus, et unimus*, or because the bishop as ordinary, or the pope as supreme ordinary, gave a license to the prior or canons of the monastery to hold them *in proprios usus*. ⁽³⁾

Effect of ap-
propriations.

By these appropriations, the tithes and all endowments of the church, as well as the church itself, in point of interest or estate, passed from the patron. ⁽⁴⁾ None but spiritual bodies having succession were capable of receiving an appropriation, as the effect of it in its original institution was to make some person perpetual incumbent; and hence appropriations were made only to ab-

⁽¹⁾ Kennett on Imp. 30.
Seld. de Dec. c. 11. § 1. 341.

⁽²⁾ Seld de Dec. c. 6. § 3.
96. Ayl. Par. Jur. Can. Ang.
13. Arthington v. Bishop of
Chester, 2 H. Bl. 423.

⁽³⁾ Seld. c. 6. § 3. Grendon
v. Bish. of Lincoln, Plowd. R.
496. Ayl. Par. Jur. Can. Ang.
87.

⁽⁴⁾ Seld. c. 6. § 3. 94.

bots, priors, and other ecclesiastical corporations, sole or aggregate, who could administer the sacraments, and perform divine service. (1)

As ecclesiastical benefices in the possession of spiritual persons are called appropriations; so, when in the hands of laymen, they are properly denominated impropriations, though these terms are now often confounded and used promiscuously: of the former, there are at present in England above one thousand; of the latter, about three thousand eight hundred and forty-five (2).

Those divisions now called parishes (from the word *Preostscyre*, which signifies the precinct of which the priest had the care or the priestshire) were thus established, differing in size according to the difference in quantity of the several circuits, demesnes, or territories, possessed by the founders. (3) The profits of churches became gradually limited to their incumbents; parishes were confined and fixed to the present limits; and tithes as gradually were considered to be due, of common right, to the parson or rector of the parish wherein they arise. (4)

(1) Wright v. Gerrard, Hob. Mod. 254. Ayl. Par. Can. R. 307. Grendon v. Bishop Ang. 254. Wats. C L, 191 of Lincoln, Plowd. R. 496, —197. Grendon's Case, 7, 8. Colt. v. Bishop of Coventry, Hob. R. 140. Sir Plowd. 499. Fanshaw v. Rotheram, 1 Eden. Ch. R. 281. H. Spelm. on Tithes, c. 29. (2) Seld. de Dec. c. 9. § 4. Seld. de Dec. c. 11. § 1. (3) Fox v. Ratty, Bunb.

(4) Wolwyn v. Awberry, 2 87.

A parson.

A parson, so called from the church being represented by him, is the rector or governor thereof, in whose person her rights are sued for and defended ⁽¹⁾, and to whom the soil and freehold of the church and church-yard belongs. ⁽²⁾

A vicar.

A vicar (*qui vicem alterius gerit*) was a name not known until the reign of king Henry the Third, before which the rector provided a curate, and maintained him by an arbitrary stipend ⁽³⁾. But in that reign the avarice of the monks and rectors had proceeded to such lengths, that the legislature found it necessary to interfere; and it was enacted ⁽⁴⁾, that curates, who, from being vice-agents, were then called vicars, should have some determinate support assigned to them, at the discretion of the ordinary*, for the perpetual maintenance of the cure, and should be canonically instituted and inducted. ⁽⁵⁾

⁽¹⁾ 1 Inst. 300 a. Fleta, lib. 9. c. 18.

⁽²⁾ Frances v. Ley, Cro. Jac. 367.

⁽³⁾ Haveden. de Vitâ W. Conq. Seld. c. 12. § 1. Ayl. Par. Jur. Can. Ang. 510. Arthington v. Bishop of Ches-

ter, 1 H. Bl. R. 423. Ward v. Britton, Cro. Jac. 518.

⁽⁴⁾ 15 Ric. 2. c. 6. 4 Hen. 4. c. 12. Britton v. Wade, Cro. Jac. 515.

⁽⁵⁾ Seld. c. 12. s. 1. Ayl. Par. Jur. Can. Ang. 513.

* The ordinary is that person who acts in his own right, and not by deputation, having an original jurisdiction over ecclesiastical matters. The term was taken from the canonists, and chiefly in former times applied to a bishop; but in some late statutes, chancellors, commissaries, and archdeacons are styled ordinaries.—1 Inst. 96. a. 1 Inst. 344. a.

Besides this provision for the vicarage, by way of charge issuing out of a religious house, there were two other modes by which it might be endowed: first, with lands, by way of agreement; secondly, with a parcel of the parsonage, generally the small, and sometimes particular parts of the great tithes. (¹)

Modes by which a vicarage might be endowed.

The vicarage being thus derived out of the parsonage, no tithes can, *de jure*, belong to the vicar, except that portion which is decreed in his endowment, or what his predecessors have immemorially enjoyed.

Vicarage derived out of the parsonage.

The rector is *primâ facie* entitled to all the tithes of the parish, small as well as great; and the vicar, in order to take any part of them from him, must either produce an endowment, or give such evidence of usage as presupposes an endowment (²), since courts will not presume any thing *ex parte* the vicar against the rector. (³) When the vicar produces an endowment, the situation of the parties is reversed; he is then *quatenus* rector (⁴), the *primâ facie* title is in favour of the vicar; and if the rector claims any of the articles

Rector *primâ facie* entitled to all the tithes;

unless the vicar produces an endowment.

(¹) *Travis v. Oxton*, Gwm. 1090.

(²) *Renoulds v. Green*, 2 Bulst. 27. *Chapman v. Smith*, 2 Vez. 511. Gwm. 847.

(³) *Greene v. Austen*, Yelv.

86. *Carte v. Ball*, 3 Atk. R. 497.

(⁴) Per Richards, C. B., in *Scott v. Lawson*, 7 Pr. R. 272.

comprehended within the terms of it, the *onus probandi* is thrown upon him. In such case it is incumbent on the rector to give such clear and cogent evidence of an usage in the parish in his favour, with respect to the articles he insists upon, as shall narrow the terms of the endowment, and induce a presumption that the parties interested had come to some new agreement, or that some different arrangement had been made with respect to the distribution of the tithes, between the date of the endowment and the statutes of Queen Elizabeth, commonly called the disabling statutes, by which such agreements were prohibited. (1)

Endowment
not always
conclusive.

An endowment, therefore, is not always conclusive evidence of the vicar's right against the parson, but may be extended, narrowed, or varied by subsequent usage; and if such usage occur, the effect of it, where it is sufficient to outweigh the endowment, is properly triable at law. (2)

Endowments
how esta-
blished.

Possession is a species of evidence to prove an endowment, where an express endowment cannot be produced, or to furnish ground for presuming an augmentation where there is no express en-

(1) *Awdry v. Smallcombe*,
Gwm. 1527. *The Attorney
General v. Cholmley*, 2 Ed.
R. 317.

1258. 7 Bro. P. C. 100. 2d
edit. by Tomlins. 4 Wood's
Dec. 268. *Manby v. Curtis*,
2 Pr. R. 284.

(2) *Carr. v. Heaton*, Gwm.

dowment (¹); which may be also presumed from the long and continued possession of first-fruits and tenths (²); and where there has been no enjoyment conformably to the terms of the endowment, usage may be resorted to, to show that a money payment has existed in lieu of what the endowment mentions. (³)

Thus, where a bill was brought for tithe-hay by an impropiator, who derived his title under a grant from James the First, expressly mentioning the tithes of hay, though there was no evidence that tithe-hay had ever been paid either to the impropiator or the vicar; yet the vicar, having received customary payments from parishioners who had nothing but meadow-ground, and consequently could pay only for the tithe of hay, and no tithe-hay having been paid to the impropiator for one hundred and twenty years, this immemorial payment to the vicar was considered as a sufficient evidence of the vicar's right to the tithe of hay. (⁴)

On the other hand, if an endowment of a vicarage is produced, under which a vicar has been accustomed time out of mind to take parti-

Where a subsequent endowment may be presumed from usage.

(¹) *Oglander v. Ld. Pomfret*, Gwm. 1244.

(²) *Crimes v. Smith*, 12 Rep. 4. *Fox v. Bardwell*, Gwm. 716. *Williams v. Price*, 1 *Daniell's Rep.* 13.

(³) *Hunston v. Cocket*, Cro. Jac. 252. *Crimes v. Smith*, 12 Rep. 4.

(⁴) *Stone v. Rideout*, Bunb. 262. Gwm. 675.

cular tithes and profits, it will be no ground for withholding such tithes from him, as they are not expressed in the endowment, as, from a long possession, it may be presumed that the vicarage has at some time or other been augmented therewith. ⁽¹⁾

Thus, where there has been a general perception of small tithes by a vicar, and of *some* articles unknown in this country at the time of the endowment, this usage is sufficient to authorize the presumption of a subsequent endowment of *all* small tithes, which carries with it articles of modern introduction. ⁽²⁾ So where the exact meaning of a word found in an endowment cannot now be defined with any certainty, recourse must be had to the safest criterion, which is usage, in each particular instance. Hence the word *alteragium* is explicable by the usage shown to have been established under it. ⁽³⁾ On the same principle, a vicar proving perception of small tithes, where the impropiator has never received other tithes than those of corn and grain, is entitled to demand tithe of agistment, turnips, and potatoes; although such tithes have never before been received by his predecessors, and although

⁽¹⁾ Twiss v. Brazen Nose College, Blunt, and others, Hard. Rep. 328. Renoulds v. Green, 2 Bulstr. R. 27.

⁽²⁾ Williams v. Price, 1 Daniell's Rep. 13. Cuncliffe v. Taylor, 2 Price, 329.

⁽³⁾ Williams v. Price and

others, 4 Pr. R. 156. Franklyn and others v. the Master and Brethren of St. Cross, Gwm. 629. Reynolds v. Green, 2 Bulstr. 27. Gwm. 1573. Scott v. Lawson, 7 Pr. R. 267.

the documentary evidence in support of his claim refers to small tithes, and not all small tithes. (¹)

Proof, indeed, of perception of tithes during living memory, where none can be shown to have been enjoyed by the rector, is sufficient to establish the claim of a vicar, although his endowment even negatives his claim to that tithe expressly, and states it to belong to the rector; for, says C. B. Richards, the length of time is sufficient if it can be carried as far back as living memory. Human memory is certainly but as a day in itself, but it is enough to found a presumption on, that it has existed long anterior, unless that presumption is contradicted by evidence, and disproved: seventy, fifty, or forty years usage, is sufficient to afford presumption of a subsequent endowment; otherwise an endowment, or any other instrument, could never be presumed in any case by force of usage. (²)

Effect of perception of tithes by a vicar, although negated by endowment.

And, in general, where a vicar proves an endowment of all the small tithes, the rector claiming any portion of them must show some grant or agreement before the disabling statutes, without which no usage nor enjoyment on the part of the

Where a vicar proves an endowment, enjoyment by rector of articles within the endowment not alone sufficient.

(¹) *Kennicott v. Watson*, 2 Pr. R. 250.

(²) *Parsons v. Bellamy and others*, 4 Pr. R. 198. "Perception and long en-

joyment is the vicar's common law proof," per *Graham (Baron)*, in *Bullen v. Michell*, 2 Pr. R. 450.

rector will bar the vicar's claim to any of the tithes within his endowment.

Thus, where an impropiator, who had always been in the habit of receiving the tithes of clover-seed and rye-grass seed, admitted, in his answer to a bill brought by the vicar for the tithe of these artificial grasses, that the vicar was entitled to all the small tithes, with the exception of the articles in question; as, at the time of the appropriation of the rectory, it was impossible for a reservation to be made of this sort of tithe, because artificial grasses have been but lately introduced into the kingdom; the tithe of these articles was adjudged to belong to the vicar, though he had neither produced his endowment, nor any written evidence to show that he was entitled to all small tithes. (1) So, where the impropiator, in his answer to a bill brought by the vicar for these tithes, stated, that he and his predecessors, from their first introduction into this kingdom, had uninterruptedly enjoyed them, and that by the custom of the parish, when grass of this description was suffered to stand for seed, it had always been considered as grain, and when cut down sooner, as hay; the vicar being entitled by his endowment to all the small tithes, the court declared that the tithes of clover-seed, saintfoin-seed, and rye-grass seed, were small tithes, and decreed

(1) *Cartwright v. Bailey*, Gwm. 938. 3 Wood's Dec. 146.

that the impropriator should refund to the vicar what he had received. (1)

Hence, even where there does not appear to be any endowment, which a vicarage may be without (2), the small tithes having been constantly received by the vicar, there is a reasonable ground of presumption, that he is entitled to all modern species of small tithes (3); and where one instance only, within thirty years, was given of a composition with a vicar for the tithes of a certain close, though it was objected that the vicar should have made out a fuller title, the court were of opinion it was sufficient. (4) But where the rector has actually, time out of mind, received some of the small tithes, thereby proving that the vicar could not have been endowed of all of them, the common law right being in favour of the rector, the vicar cannot, against that common law right, claim a species of small tithe which he has never enjoyed; for possession is every thing, and there is nothing courts of justice cannot presume in favour of possession. (5)

Where there is no endowment, usage every thing.

(1) *Clarke v. Stapler*, Gwm. 144. 2 Wood's Dec. 218. 926. *Howley v. Venables*, Wright v. Southwood, 1 Dan. R. 140. 3 Wood's Dec. 207.

(2) *Cope v. Bedford*, Palm. (5) *Travis v. Oxton*, Gwm. R. 426. 1091. *Dorman v. Curry*, 4

(3) *Payne v. Powlett*, Gwm. Pr. 116. *Vicar of Kellington v. Trin. Coll. Camb.* 1 Wils.

(4) *Goole v. Jordan and others*, Gwm. 648. Bunb. R. 17.

✱ The right to compel an account for tithes being consequential to the legal title, and the rector being *primâ facie* entitled to all the tithes, in questions between the rector and vicar, a court of equity will not make a decree against the rector, until the title of the vicar has been established by the decision of a jury; unless such title is made out in the most clear and satisfactory manner. ⁽¹⁾

Where the vicarage is not endowed, the impropiator of the small tithes is bound to maintain a priest, and, upon an information by the attorney general for that purpose, the king may assign such an allowance or proportion of the small tithes as he may think proper, though this cannot be the case if the vicar is endowed, however small the endowment may be. ⁽²⁾

Difference
between im-
propriator
and rector.

There is no difference, in any respect, between the rights of a lay impropiator and spiritual rector; the former becomes, as it were, a spiritual person, holds tithes by the same common right, and is entitled to all the favourable presumptions and constructions that would be allowed to a spiritual rector ⁽³⁾, and there can be no presump-

⁽¹⁾ Barnard v. Garnons, 7 Bro. P. C. 105. 2d ed. by Tomlins, 4 Wood's Dec. 377.

⁽²⁾ Bonsey v. Lee, 1 Vern. 247.

⁽³⁾ Fanshaw v. Rotherham, 1 Ed. R. in Notis, 302. Scott:

v. Airey, per Eyre, C. B. Gwm. 1174. Charlton v. Charlton, per Reynolds, C. B. Bunb. R. 325. Whieldon v. Harvey, per Thomson, C. B. Gwm. 951.

tion from non-payment of tithes during any length of time against him. (1)

It may indeed be observed generally, that as actual enjoyment, occupation, and pernancy is sufficient evidence, to presume a right in favour of the person enjoying (2); so mere non-payment of a particular species of tithe, or proof that no tithes in kind have ever been rendered within living memory, is no answer to a person *prima facie* entitled to tithes throughout a parish (3), but further proof of some immemorial compensation is necessary. (4)

Of non-pay-
ment of
tithes.

A curate is he who represents the parson or vicar, and officiates in his stead. (5) As vicars were appointed to perform the spiritual duties in particular places that were allotted to them, and allowed part or the whole of the revenues accruing to the church within the prescribed limits; so there were other churches, the revenue of which

A curate.

(1) Meade v. Norbury, 2 Pr. R. 345. Nagle v. Edwards, per Macdonald, C. B. 3 Aust. R. 702. Sed vide, Rose v. Calland, 5 Ves. R. 186. Lord Petre v. Blencoe, 3 Aust. R. 945. Berney v. Harvey, 17 Ves. R. 127.

(2) Parsons v. Bellamy, 4 Pr. R. 190. Manby v. Cur-
tis, 2 Pr. R. 234. Williams
v. Price, 1 Dan. R. 13. Tra-

vis v. Oxton, Gwm. R. 1066.
Countess Dartmouth and
others v. Roberts, 16 East, R.
334.

(3) Corporation of Bury St.
Edmunds v. Evans, Gwm. R.
757. Heathcote v. Alridge,
1 Madd. R. 242.

(4) Adams v. Evans, 4 Pr.
R. 16.

(5) Wood's Inst. L. E. 40.
1 Bl. Com. 393.

was appropriated and annexed to the mother church, served by temporary curates belonging to their respective houses in the neighbourhood, and sent out as occasion required. These curates had no kind of interest in the tithes, but were appointed by, and removed according to the pleasure of, the rector or head of the house to whom they were due ⁽¹⁾. In general, therefore, a curate has no claim to the tithes of a parish, as he can show no title to them, has no permanent interest in them, and acts under an appointment, which is, in its very nature, revocable at law, even without any cause assigned. ⁽²⁾* Neither can a curate, since he is not a sole corporation, take the benefit of a devise to him by that name; but if an impropiator devises a certain part of the tithes to him, and all that should serve the cure after him, though the curate is incapable by law of taking such a devise, having no succession, yet, in equity, the heir of the devisee would be seised in trust for the curate for the time being. ⁽³⁾

⁽¹⁾ *Bett v. Brabalon*, Noy.

15. *Arthington v. Bishop of*

Chester, 1 Hen. Blac. 423.

Dixon v. Metcalfe, 2 Ed. R.

365.

⁽²⁾ *Price v. Pratt*, 1 Barn.

233. *Birch v. Wood*, 2 Salk. R. 506.

⁽³⁾ *Anon.* 2 Vent. 340.

Arthington v. Bishop of

Chester, 1 Hen. Blac. 418.

* But see 2 Burn's Ecc. L. 75. and 12 Ann. stat. 2. c. 12. 1 Geo. 1. stat. 2. c. 10. 36 Geo. 3. c. 83. 53 Geo. 3. c. 149. and 57 Geo. 3. c. 99. relative to the support and maintenance of stipendiary curates; by the latter of which acts the bishop may remove any curate, and direct him to give up possession of the parsonage, &c.; but the curate cannot be

There are, however, cases where a curate is said to be capable of holding tithes. ⁽¹⁾ In Wales, and elsewhere, curates have rights of this sort; and there are perpetual curacies, having all the characteristics of a parish church. The nominations to these perpetual curacies are like those to donatives, or benefices given and possessed by the single donation of the patron in writing, without presentation, institution, or induction, only that the persons nominated to curacies must be authorized by the license of the bishop, before they can legally officiate; whereas possession by donation is not so subject, but is effected by the sole and single act of the donor. ⁽²⁾

A perpetual curate.

Curacies first became perpetual, when appropriations, together with the charge of providing for the cure, were transferred from spiritual societies to single lay persons, who, being incapable of serving them by themselves, procured the ordinary to license some particular person to perform the duties of the cure; and curates thus became so far perpetual, as not to be wholly subject to the pleasure of the appropriator. ⁽³⁾

When curacies first became perpetual.

⁽¹⁾ *Brereton v. Tamberlaine*, 2 Vez. 425. R. 426. *Martin v. Hind*, Cowp. R. 487. *Anon*, 2

⁽²⁾ *Gibs. Cod.* 819. 1 Inst. Vent. R. 349.

344. *Clarke v. Heath*, Sid. ⁽³⁾ *Gibs. Cod.* 819.

dispossessed by the rector or vicar without three months' notice, and permission from the bishop, in writing, for that purpose.

SECTION II.

Of Portions of Tithes.

The origin of
portions of
tithes.

THE alienation of tithes, whether to laymen or to spiritual corporations, as abbeyes, and the like, was not abolished until Pope Innocent the Third addressed a decretal epistle to the Archbishop of Canterbury, appropriating them to those persons who had the cure of souls in the respective parishes. ⁽¹⁾ Before that period, it was a common practice to grant the tithes of a whole manor, or of a particular farm, to any spiritual person or corporation. The lord of a manor, who had part of his estate in one parish, and part in another, perhaps obliged his tenants to pay all their tithes to a church which he built in one of the parishes within that manor: the church soon got into the hands of the priors and monks of those days, and arbitrary consecrations and conveyances were as soon made to them. ⁽²⁾ A restraint was imposed on this practice by the appropriation of parochial tithes; but as the right to tithes, which had been granted according to the method that has been just described, continued in the spiritual person or corporation, the tithes thus granted, in order to distinguish them

⁽¹⁾ Wood Vin. Lect. 22.
87.

⁽²⁾ Seld. c. 6. § 4. Spelm.
37, 38, &c. 2 Inst. 641.

from the other tithes of the parish, were called portions of tithes. (1)

Of these portions of tithes, some remain in the hands of spiritual persons; others, which came to the crown by the dissolution of monasteries, are in the grantees of the crown, and the impropiators may claim them by prescription in the abbots or priors—an usage since the dissolution, being sufficient to prove the prescription. (2)

In a suit, however, for such portions of tithes, it will not be necessary for an impropiator or other rector to set forth particularly to what monastery they belonged, and so derive the title downwards to himself; but he may allege generally the seisin of those from whom he immediately claims (3); and where a layman has been in possession under a title traced back for one hundred and fifty years, equity will not disturb the possession, but leave the rector to establish his right at law (4); nor will a court be unwilling to presume a grant before the restraining statutes, though tithes are not mentioned in the title-deed under which the lands are claimed, if the portion

(1) 6 Bac. Abr. Tit. Tyth. Crayhorne v. Taylor, Gwm. H. 730. 650. Lowther v. Bolton,

(2) Degge, c. 2. 226. Seld. Gwm. 1120.

c. 13. § 1. Gibbs. Cod. 663. (4) Scott v. Airey, cited

(3) Phillips v. Kettle, Hard. 1 Anst. 311.

173. 2 Wood. Vin. Lect. 88.

of tithes has been possessed by the occupiers for a series of years. Who, says Lord Kenyon, can disturb a title of this kind, on a possession of two centuries and a half? Such a length of possession is positive prescription, as they say in the civil law. ⁽¹⁾ In questions nevertheless between a rector and a portionist touching their respective rights, the rector, it is presumed, is entitled to stand upon his common law right, and to throw the *onus probandi* upon the portionist, though the rector has, for a long series of years, been in possession of the portion as lessee thereof, and so confounded the boundaries. ⁽²⁾

Distinct from
the rectory.

The parson of one parish may prescribe to have some of the tithes in the parish of another ⁽³⁾, these portions of tithes being entirely distinct from the rectory ⁽⁴⁾; so distinct, that if a portion of tithes is granted in a parish, the tithes belonging to the rectory will not pass thereby. ⁽⁵⁾ So, if a person has a portion of tithes, and afterwards purchases the rectory, the portion of tithes does not merge in the rectory, or become extinct by the purchase, but remains grantable, as the

⁽¹⁾ Oxenden v. Skinner, Gwm. 1513.

⁽²⁾ Ferrars v. Pellat, Gwm. 1602.

⁽³⁾ Seld. c. 7. § 3. 2 Inst. 641. 1 Roll. Abr. 653. Gib. 663.

⁽⁴⁾ Downes v. Mooreman, Bunb. 189. Boulton v. Richards and Booth, 6 Price's, R. 483.

⁽⁵⁾ Bozoun's case, 4 Rep. 35.

portion may be even more ancient than the rectory. ⁽¹⁾

As a spiritual person may thus have a right to a portion of tithes in a parish of which he is neither rector nor vicar, so an impropriator may have a portion of tithes in a parish of which he is not impropriator ⁽²⁾; and in an action of debt it will not be necessary for him to set forth his title, particularly as such portionist ⁽³⁾, though the land must be accurately shewn over which the portion of tithes is stated to have been granted. ⁽⁴⁾ So where a portion of tithes has been for a long time used with a chapel, it will pass by the grant of the chapel, and all tithes thereunto belonging, without the expression of portion of tithes. ⁽⁵⁾

⁽¹⁾ Sir E. Coke's case, 2. Roll. Rep. 161. Gibs. Cod. 683.

⁽²⁾ 6 Bac. Abr. Tit. Tyth. H. 790.

⁽³⁾ Sanders v. Sandford, Cro. Jac. 457.

⁽⁴⁾ Sandford v. Porter. Essex Lent Assizes, 1819, MSS.

⁽⁵⁾ Wats. Cl. L. 431.

SECTION III.

Of Glebe Lands.

Definition of glebe. **GLEBE** * is a portion of land belonging to, or parcel of, the parsonage or vicarage, over and above the tithes.

Of the tithe of glebe, as between rector and vicar; *Decimas ecclesia ecclesiæ reddere non debet, and clerici a clericis decimas non exigant*, are *maxime* of the law; and a vicar, therefore, under a general endowment of small tithes, is neither obliged to pay the great tithes of his glebe to the rector ⁽¹⁾, nor entitled to the small tithes of the rector's glebe. ⁽²⁾ But if the endowment expressly includes the small tithes of the glebe lands, the rector must then pay tithes to the vicar, though the glebe is in his own hands. And where the vicar, who was endowed with the small tithes, sued the rector for the tithe of a mill newly

<p>⁽¹⁾ <i>Blincoe v. Marson</i>, Cro. El. 479. <i>Wats. Cl. L.</i> 505.</p> <p>⁽²⁾ <i>Blincoe v. Marson</i>, Moore, 457. Cro. El. 579.</p>	<p>Degge, c. 2. 228. <i>Gibs. Cod.</i> 661. <i>Warden of St. Paul's v. the Dean</i>, 4 Pr. R. 73.</p>
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* The word *glebe* properly means a hard turf, or clod of earth, with grass growing thereon. — Ayl. Par. Jur. Can. Ang. 285.

erected on his glebe lands, the Court adjudged that such tithe should be paid to the vicar.⁽¹⁾ So, if the parson's or vicar's glebe is in another parish than where the church is situated to which it belongs, the tithes of such glebe are payable to the incumbent of that parish wherein the glebe lies, unless some special exemption is shewn. ⁽²⁾

The glebe being an addition to the parson, *ex dono fundatoris*, a rector may be without any glebe, as he may convey it to the vicar, reserving a rent only for himself. ⁽³⁾ So, he may let his rectory, reserving his glebe lands, in which case he must pay tithes to his lessee ⁽⁴⁾; or he may lease his glebe lands, and not grant the tithes, which must be then paid by the lessee to him. ⁽⁵⁾

By 28 Hen. VIII. c. 11. (by which statute the advantages of emblements are particularly extended to the clergy,) incumbents who have manured and sown, at their proper costs and charges, any of their glebe lands with corn or grain, are enabled to declare their testaments of all the profits of the corn growing upon the lands so manured and sown.

⁽¹⁾ Anon. Gwm. 286.

⁽²⁾ Seld. c. 6. p. 76. Wats. Cl. L. 505.

⁽³⁾ Edgar v. Sorrel, Gwm. 435. Cro. Car. 169. Gibs. Cod. 661.

⁽⁴⁾ Gibs. Cod. 661.

⁽⁵⁾ Stile v. Miles, Owen, 39. Dy. R. 43, a. 1 Rol. Abr. 655. Brownl. R 69.

Of the tithe
of glebe when
the parson
dies.

But where a parson sows his glebe, and dies before it is cut, when his executor severs the corn, the *tithe thereof* belongs to the successor; for though the executor represents the person of the testator, yet he cannot represent him as parson. ⁽¹⁾ But if the parson lives till after severance from the ground, though he dies before the corn is carried off, the successor is not entitled to tithe, because after severance the land was no longer producing it. So also in the case of deprivation or resignation; after the glebe is sown, the successor is entitled to the tithe, if the corn was not previously severed. ⁽²⁾

During the voidance of a church, the fee-simple of the glebe is in abeyance, but the freehold of the glebe after induction is in the parson. ⁽³⁾

⁽¹⁾ 3 Barn's E. L. 415.
Wats. Cl. L. p. 504. 1 Roll.
Abr. 655.

⁽²⁾ Moyle v. Ewer, 2 Bulstr.
183.

⁽³⁾ 1 Inst. 342. b. Gibs.

Cod. 661. Ayl. Jur. Cas.
Ang. 286. Clifford v. Wicki,
1 Barn. and Ald. R. 506.
Beckwith v. Harding, 1 Barn.
and. Ald. R., 517. Gray
brook v. Fox, Plowd. R. 251.

SECTION IV.

Of Tithes in extra-parochial Places.

As the right of all parochial tithes not appropriated belongs *de jure*, to the rector of that parish wherein they arise, so all extra-parochial tithes belong to the king, who is deemed capable of tithes at the common law in pertainancy. ⁽¹⁾

Extra-parochial tithes due to the king.

By the canon law, tithes in extra-parochial places belonged to the bishop of the diocese wherein they arose, as general parson of his whole diocese ⁽²⁾; but, by the common law, they belong to the king. Thus, in the case of Ralph Bishop of Carlisle, in the reign of Edward the First, a prohibition was granted relative to the tithes in a certain part of Inglewood forest; and those tithes were decided to belong to the king, and to him only, and to be grantable by him at his pleasure, because they arose in a part which was not within any parish. ⁽³⁾ And Edward the First granted the tithes arising from land within the forest of Deane, not being within any parish, to the Bishop of Llandaff and his successors. ⁽⁴⁾

⁽¹⁾ 2 Inst. 647. 1 Roll. Abr. 657. Gibs. Cod. 663.
⁽²⁾ Seld. c. 11. § 4.

⁽³⁾ 1 Roll. Abr. 657.
⁽⁴⁾ 2 Inst. 646.

CHAP. III.

Of the Time and Manner of setting out Tithes

All persons
obliged to
set out their
predial
tithes.

BY the 2 & 3 Edw. VI. c. 13. it is enacted, that all persons shall truly and justly, without fraud or guile, divide, set out, and pay all manner of their *predial* tithes in their proper kind, as they arise, in such manner and form as hath been of right yielded and paid within *forty years* next before the making this act, or of right or custom ought to have been paid; and no person shall carry away any such or like tithes which shall have been yielded or paid within the said forty years, or of right ought to have been paid in the places tithable, before he has justly divided or set forth for the tithe thereof the tenth part of the same, or otherwise agreed for the tithes with the parson, vicar, or other owner or farmer of the same tithes, under pain of forfeiture of treble value of the tithes so carried away.

Tithe-owner
to see the
tithes set
forth and
severed, and
to carry
them away.

By the second section of the same act, at all times and as often as predial tithes are due, it shall be lawful for every party to whom the tithes ought to be paid, or his deputy or servant, to view and see the same justly and truly set forth and

severed from the nine parts, and to take and carry them quietly away; and if any person carry away or willingly withdraw his predial tithes, or stops or prevents the same from being viewed, taken, or carried away, by reason of which the said tithe is lost, impaired, or hurt, then, upon due proof thereof being made before the spiritual judge, or any other judge, the party so carrying away, withdrawing, letting, or stopping, shall pay the double value of the tenth or tithe so taken, lost, withdrawn, or carried away, over and besides the costs, charges, and expenses in the suit in the same; the same to be recovered before the ecclesiastical judge, according to the king's ecclesiastical laws.

First. — It may be observed, that in actions of debt upon this statute, the party interested in the tithes is the person to recover the treble value, although it is not expressly awarded him by the statute ⁽¹⁾; for as he is the person grieved, having the property in the tithes, to him the treble value is given. And whenever a statute gives a forfeiture or penalty against a person wrongfully detaining, or dispossessing another of his duty or interest, in that case he that has the wrong, and not the king, as was formerly imagined, has the forfeiture or penalty. ⁽²⁾

Forfeitures to be paid to the party interested.

The penalty is confined to particular tithes

⁽¹⁾ 2 Inst. 650. Bul. N. P. | ⁽²⁾ 1 Inst. 159.

and does not extend to mixed or personal, no indeed to all predial tithes, but such only as are capable of being set out. ⁽¹⁾ Forty years were named in the statute, because forty years in the ecclesiastical court make a prescription ⁽²⁾, and if the declaration omits to state that the tithes had been yielded and paid, and of right ought to have been paid within forty years next before the passing of the act, it will be defective even after verdict, such words being material and the averment necessary. ⁽³⁾

Difference
between ac-
tions in the
temporal and
the ecclesias-
tical courts.

Secondly.—The tithe-owner has his election to sue for the treble value at the common law, or for the double value in the ecclesiastical court, and for subtraction of tithes there also. The reason why in the one case the treble, and in the other the double value is given, seems to be, that in the temporal courts the tithes themselves cannot be recovered; whereas, in the ecclesiastical court, the tithes themselves may be recovered, which, with the double value (all that the spiritual court are empowered to give), are equivalent to the treble forfeiture at law. ⁽⁴⁾

⁽¹⁾ Per Holroyd J. in *Butt v. Howard*, 4 Barn. and Ald. 659. Per Macdonald C.B. in *Scarr v. Trin. Coll.* 3 Anst. R. 760. Gwm. R. 1447.

⁽²⁾ 3 Burns. Eccl. L. 489. 2 Inst. 649.

⁽³⁾ *Butt v. Howard*, 4 Barn.

and Ald. 655. Lord Mansfield v. Clarke, 5 T. R. 264. *Kinaston v. Clark*, Sum. Ass. Salop. 1769. cor. Yates J. cited in 5 T. R. 265.

⁽⁴⁾ *Baldwin v. Girrie's case*, Godb. R. 245. 2 Inst. 680.

Hence the suit in the ecclesiastical court was more advantageous than the suit for the treble value in the temporal, since in the latter no costs were given, as was the case in the former.

But now, by stat. 8 & 9 W. III. c. 11. § 3. in actions of debt upon the statute for not setting forth tithes, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles, that is, six pounds thirteen and four-pence, the plaintiff, on obtaining judgment, shall recover his costs. Where the damage found does exceed the sum of twenty nobles, the jury cannot assess costs, nor give any other than treble damages. ⁽¹⁾

Costs given
by stat. W. 3.

Nor will costs be given, although the single damage be under twenty nobles, unless assessed by a jury. Thus, in an action of debt for the penalty on the 2 & 3 Edw. VI. c. 13. for not setting out tithes, with a count for the single value, after a demurrer to the declaration, the parties submitted to an arbitration, and the arbitrator awarded the single value to be less than twenty nobles. The court held, that the plaintiff was not entitled to costs under the statute of 8 & 9 W. III. c. 11. on the counts for the penalty, the value not having been found by a jury; but they allowed him to have costs taxed on the count for the single value ⁽²⁾; which, in many cases, unless the value

When assessed
by a Jury.

⁽¹⁾ Day v. Peckwell, Moore, 915. | Blac. 107. Barnes, 150. Tidd's Pr. 929.

⁽²⁾ Barnard v. Moss, 1 Hen.

of the tithes is very great, may be equivalent to the treble value without costs.

Costs under
an award.

Where the first count in the declaration was for the treble value of the tithes, and the other counts for the single value, a verdict having been entered for the plaintiff on the whole declaration, subject to the award of an arbitrator, who directed his decision to be endorsed on the *postea*, giving thirty shillings treble value of the tithes taken away by the defendant, damages one shilling, costs forty shillings; it was held, that the *postea* itself was a verdict of the jury, and the arbitrator, having awarded damages, entitled the plaintiff to his costs. (1)

Of notice of
setting out
tithes.

Every person being bound to set out the tithes of the produce of his land, in order that this may be done with good faith, and without fraud, the ecclesiastical court requires that notice should be given to the parson when the tithes are severed. This is not necessary at common law. (2) The statute only says, that it shall be lawful for the tithe-owner to view, and see the tithes justly set forth, and quietly to take and carry away the same. It is therefore essential, in the mode of setting them forth, that the tithe-owner should have an opportunity of seeing them separated from the

(1) <i>Pedley v. Frampton</i> , 3 Price's Rep. 474.	<i>Noy</i> , 19. <i>Gale v. Ewer</i> , 1 Com. Rep. 23. <i>Anon.</i> 2
(2) <i>Butter v. Heathby</i> , 3 Bur. 1892. <i>Spencer's Case</i> ,	Vent. 48.

other nine parts, so as to be able to compare the one with the other. ⁽¹⁾ But to do this, it is not necessary that he should have previous notice as to the time of severing them. A custom to set out tithes without the view of the tithe-owner ⁽²⁾, or by the tithe-owner without the consent of the owner, has been held bad. ⁽³⁾ The tithe-owner is entitled to and must have an opportunity of judging whether or not the tithes are fairly set out ⁽⁴⁾; and even if the occupier justly divides the tithe from the nine parts, and sets it out, but immediately afterwards carries it away, this will be considered as fraud and guile within the statute. ⁽⁵⁾ In many of the parishes in the west of England, the custom of notice prevails. As tithes depend in a great measure upon custom, so also does the manner of setting them out. Where such is the custom, the custom is *lex loci*; the law of the land in that parish ⁽⁶⁾; and in that case, the notice should be reasonable, such as will give the tithe-owner time to attend to the setting out the tithes. An hour's notice is insufficient; in the middle of summer he may be engaged in tithing other

⁽¹⁾ *Wilson v. Bishop of Carlisle*, Hob. 107.

⁽²⁾ *Ibid.*

⁽³⁾ *Anon.* Gwm. 562.

⁽⁴⁾ *Boughton v. Wright*, Bunb. 186. *Thomas v. Rees*, Gwm. 796.

⁽⁵⁾ *Heale v. Sprat*, 2 Inst. 649.

⁽⁶⁾ *Butter v. Heathby*, 3 Bur. 1891. *Helier v. Trist*, 3 Wood's D. 128.

fields or farms, perhaps at the extremity of the parish. ⁽¹⁾

Of the time
and manner
of setting out
tithes.

In general, all the produce cut down in a field should be tithed before any part of it is carried away. The quantity to be cut down at each time is in the discretion of the occupier, unless there appears to be a design to defraud, harass, or vex the tithe-owner, but a reasonable quantity at least must be cut down before tithing ⁽²⁾; and the statute 2 & 3 Edw. VI. must be so strictly adhered to, that in a case where the corn had been standing for a long time, and the weather had continued so precarious that the occupier was unable to put it into shocks, but obliged to cut small quantities at a time, and throw nine sheaves into a cart, leaving out the tenth, giving the tithe-owner notice of the same; it was reluctantly decreed by the court, that this was not a due setting out the tithes. ⁽³⁾

Nevertheless, though, by the general rule, an occupier may not, according to his pleasure, tithe and carry part of a field of corn which has been cut, before the whole is tithed; yet it will be otherwise where there is nothing like fraud or vexation, and a necessity exists, such as that which arises from partial ripeness or variable

⁽¹⁾ *Tennant v. Stubbing*,
3 Ant. 640. Gwm. 1441.

⁽²⁾ *Hall v. Matchett*, 3
Anst. 915. Gwm. 1460.

⁽³⁾ *Franklyn v. Gooch*, 3
Anst. 682. Gwm. 1441.

weather. There is no rule of law which obliges an occupier to tithe the whole of that part of a field which lies in one parish, before he proceeds to tithe any part of the same field lying in another parish. Hence, where a farmer cut the whole of a field lying in two parishes, and after cocking and tithing part in one, proceeded to cock and tithe part in the other; and the weather appearing doubtful, carried that part which was tithed in one parish the day before the rest of the field which was in that parish was tithed; it was held that this, being done *bonâ fide*, was lawful. (1)

After the tithes are set forth, the tithe-owner or his servants may come and spread abroad, dry, or stack them in any convenient place, whereon they have grown, until they are sufficiently weathered and dried; but he must not take a longer time than is reasonable and necessary for the benefit of his tithe. (2) This conveniency of time is naturally dependent on the quantity of the crop, the weather, and other circumstances. Where tithe is suffered to remain on land longer than it ought, to the damage and inconvenience of the owner, he may either distrain it as damage feasant, or bring an action on the case (3); but he

Of the privilege of the tithe-owner to dry and make his tithe.

(1) *Leathes v. Levinson*, 12 E.R. 239.

(2) *Degge*, c. 14. 273. 1 Roll. Abr. 643.

(3) *Mountford v. Sidley*, 3 Bulst. 336. Gwm. 424.

cannot turn his cattle into the field to depasture it in the usual course of husbandry, as he would be thereby making himself the judge in his own cause of what is a reasonable time. And to permit him to put in his cattle and eat it, might be a much greater loss to the tithe-owner, than that which the occupier might sustain by the continuance of the tithe upon the land. (1) In a late case, Baron Wood seems to doubt the occupier's right to distrain tithes, damage feasant; and as it is undecided what time is to be considered a reasonable time for their remaining upon the land, the more prudent remedy seems to be by action on the case. (2)

Of carrying
away tithe.

The tithe-owner has a right to carry away his tithes, and if he is obstructed, has his remedy in the spiritual court. In ordinary cases, he may use the same road which the occupier of the land uses; but he cannot break any rails, gate, lock, or hedge, more than is absolutely necessary for his passage. (3) He is not allowed to pass through a private road on another person's land, though that road may be the nearest for the conveyance of his tithes. If lands, heretofore in one occupation, become occupied by several, the right to use what was the road before there was a separation,

(1) *Shapcott v. Mugford*,
Ld. Raym. 187. *Williams v.*
Ladner, 8 T.R. 72.

wick's R. 113. Et vid. *Godol.*
Rep. 362.

(2) *Baker v. Leathes*, *Wight-*

(3) *Degge*, c. 14. 274. *Hamp-*
ton v. Courtney, 1 Bulst. 108.

will not necessarily continue after separation : the tithe-owner can only use for each occupier's tithe the road that the occupier uses.⁽¹⁾ Again, he is not even entitled to carry his tithes home by every road which the farmer himself uses for the occupation of his farm, but may pass over that road only which the farmer uses for the occupation of the field in which the tithe grows.⁽²⁾ In collecting the tithes, he is not obliged to unload his waggon before driving it on the ground of each parishioner: for as the whole tithe of a farm may not load half a waggon, it is but reasonable that he should be permitted to fill it from other farms.⁽³⁾

(¹) *Bosworth v. Limbrick*,
Gwm. 1109.

(²) *Cobb v. Selby*, 2 New
Rep. 469. 6 Esp.R. 103.

(³) *Lake v. Bruton*. Gwm.
775.

CHAP. IV.

Of what things a Predial Tithe is due.

SECTION I.

Of the Tithes of Aftermath.

Definition of
aftermath.

AFTERMATH is the second math or mowth, that is, the second crop, cut from land before mown in the same year.

Tithe of
aftermath
due of com-
mon right.

It was formerly held that no tithe was *de jure* due for aftermath (¹); and that it was but form to lay a custom to be discharged of it in consideration of making the first mowing into hay. Tithes were then said to be payable only *de rebus semel in anno renovantibus*. (²) This principle has, however, ceased to be considered as law; and the tithe of aftermath is now generally acknowledged to be due, of common right. (³) Indeed, so long since as in the time of Degge, it is said, that if meadows are so rich, that there are two crops of hay got in one year, the parson is entitled to the tithes as well of the latter as of the former crop. (⁴) Hence, in the case

(¹) Hall v. Fettyplace, Cro Jac. 42. 2 Inst. 651. Richardson v. Cabell, Poph. 142. Johnson v. Parker, 2 Roll. Rep. 191.

(²) Norton v. Brigs, Ld. Raym. 243.

(³) Grysman v. Lewis, Cro. El. 446. 1 Roll. Abr. 640. Gibs. Cod. 676.

(⁴) Degge, c. 3. 237.

of *Margetts v. Butcher*, the court delivered their opinions *seriatim*; that, of common right, the tithes of aftermath, or of the second crop of grass or herbage, cut in meadows whereof the tithe of the first crop has been before rendered, is due and must be set forth, unless some custom or prescription is shown in discharge of it. ⁽¹⁾ Numerous subsequent decisions support the doctrine then laid down ⁽²⁾; and the opinion of Richardson, C. J., that tithes shall be paid *de omnibus renovantibus et crescentibus*, appears since to have been acted upon. ⁽³⁾

A special custom or prescription claimed in discharge of this tithe, has however, upon many occasions, been allowed to prevail. ⁽⁴⁾ Thus, a prescription that the occupiers of meadow ground within a parish had been accustomed to make the first vesture into hay, and to pay the tenth cock thereof, well dried, in satisfaction of the tithe of such first vesture and the aftermath, has been held a good discharge. ⁽⁵⁾ So, where the grass grew in a wet place, an exemption from the payment of this tithe was allowed, in consideration

Exemptions
from the
tithe of
aftermath.

⁽¹⁾ Gwm. 531.

⁽²⁾ *Wakelyn v. Hellyer*, 2 Wood's Decr. 494. *Horton v. Goddard*, 3 Wood's D. 151. *Benson v. Watkins*, Bunb. 10. *Baker v. Mason*, 4 Wood's D. 257. *Selby v. Bank*, 12 Mod. 498. *Howse v. Carter*, 4 Wood's D. 451. *Sherington v. Fleetwood*,

Cro. El. 475. *Jouce v. Parker*, *Cro. Jac.* 575.

⁽³⁾ *Andrews v. Lane*, Gwm. 473.

⁽⁴⁾ 1 Roll. Abr. 640.

⁽⁵⁾ *Johnson v. Aubrey*, *Cro. El.* 660. *Moore*, 910. *Green v. Austen*, *Cro. Jac.* 116. *Anon. Cro. Car.* 403.

of its being constantly carried by the occupier to a drier spot. ⁽¹⁾ In like manner, a prescription that the inhabitants had been accustomed, time out of mind, to cut down the grass of the first mowth, and to tedd it and shake it abroad, and then to gather it into weeks and windrows, and to put it into small cocks, without making it into perfect hay, has been held a sufficient consideration for the discharge of the payment of this tithe. ⁽²⁾

The greatest allowance that seems ever to have been granted, in favour of the occupier, is where a custom was admitted to discharge the tithe of the aftermath of clover grass, in consideration of the parishioners making the first mowth of the grass into equal cocks, and thus setting them out at their own expence. ⁽³⁾ It is not probable that a discharge for such a consideration would now be allowed. It will be hereafter shown, that the earliest stage in which tithes of this nature can be taken, is in grass cocks of equal magnitude, and that it is at least the duty of the occupier to collect them into cocks of that description before tithing. If such collection is to be deemed a sufficient discharge for the tithe of aftermath, it must be considered as due only by custom; whereas, in fact, it is due of common right, and discharged alone by custom.

⁽¹⁾ *Andrews v. Lane*, Gwm. 473.

⁽²⁾ *Hall v. Fettyplace*, Cro. Jac. 42.

⁽³⁾ *Durrant v. Booty*, 2 Lut. R. 1071.

SECTION II.

Of Agistment Tithe.

AGISTMENT tithe is the tenth part of the grass Definition of agistment tithe. or herbage eaten by an animal paying no other tithe, and is to be paid in proportion to the value of keeping the animal on the grass or herbage so eaten. ⁽¹⁾

It is so called from the French word *geyser*, A small tithe, and due of common right. to lie, because the beasts that graze upon the land where they are kept, are there *levant* and *couchant*. ⁽²⁾ It is a small tithe ⁽³⁾, and due of common right, because the grass which is eaten is *de jure* tithable, and must have paid tithe if cut when full grown. ⁽⁴⁾

It may be considered as a general rule, that the General rule as to agistment tithe. tithe of agistment, which arising immediately from the soil is a predial and not a mixed tithe, is to be paid for dry, barren, and unprofitable animals, that yield no other profit to the tithe-owner, and is due from the occupier of the land, and not the

⁽¹⁾ *Byam v. Booth*, 2 Fr. R. 267. *Ellis v. Saul*, 1 Anst. 332. *Scarr v. Trin. Coll.* 3 Anstr. 761. Gwm. 1445.

⁽²⁾ 4 Inst. 293.

⁽³⁾ *Vicar of Kellington v. Trin. Coll.* 1 Wils. R. 170. *Mlingworth v. Leigh*, Gwm. 1615.

⁽⁴⁾ *Hicks v. Woodson*, 2 Salk. 655. *Ld. Raym.* 197. *Comb. R.* 403. *Gryman v. Lewis*, Cro. El. 446. *Pory v. Wright*, Hard. R. 184. *Monday v. Lovice*, Moore, 454. *Seld. c.* 11. 328.

agistor, or owner of the animal, whom it might be impossible to find. ⁽¹⁾

Not due for animals used in husbandry, bred for the plough or pail within the parish ;

Hence it is not payable for the agistment of young cattle reared for the pail or plough, or cows reserved for calving in the same parish, when dry ⁽²⁾; for oxen or horses employed and used in the cultivation of land in that parish wherein they feed, as they conduce to the profit of the tithe-owner in his other tithes ⁽³⁾: but when milch cows are grown old and kept dry, and depastured as other dry cattle, or when oxen after they have been used for the plough, are turned out to fatten ⁽⁴⁾, or if these animals during the profitable period of their existence, are depastured in one parish and used in another, the effects of their labour, the usual satisfaction for the tithe of their pasture, being entirely lost to the tithe-owner of the former parish, he is entitled to his agistment tithe for them. ⁽⁵⁾

Nor when occasionally used out of the parish ;

If, however, horses are kept in one farm, and used *occasionally*, not habitually, on another, in an adjoining parish, they are considered as within the general exemption in favour

⁽¹⁾ *Laurkin v. Wilde*, Poph. 126. Freem. R. 329. *Pothill v. May*, 1 Bulst. 171. *Hampton v. Wild*, Cro. Jac. 430.

⁽²⁾ *Anon.* Het. R. 100. *Holbeeck v. Whadcocke*, Hard. R. 184.

⁽³⁾ 1 Roll. Abr. 646. *Degge*, c. 5. 249. *Facy v. Long*, Cro. Car. 237.

⁽⁴⁾ *Sandys v. Eastmond*, Wats. Cl. L. 559.

⁽⁵⁾ *Scoles v. Lowther*, Id. Raym. 129.

of animals used in husbandry. (1) When cattle have ceased to work, and are turned off to graze, and fattened for sale, being no longer beneficial to the tithe-owner in any other way, the tithe for the herbage which they eat becomes immediately due. (2) Horses kept for pleasure, though clearly not in any way beneficial to the tithe-owner, have been held to be exempted from the payment of this tithe (3); and reasoning therefore by analogy, we may infer, that carriage-horses kept for the same purpose would be subject to the same exemption. But the only case in which the question seems to have been agitated, was where coach-horses were not confined to purposes of pleasure, but occasionally used for purposes of profit, as in drawing coals, bricks, wood, and manure; when it was held, that the agistment tithe was payable. (4) So, travellers' horses taken in for hire are not within the general exemption of saddle-horses, but the occupier of the ground must pay the tithe of their herbage. (5)

nor for
horses kept
for pleasure.

(1) *Filewood v. Button*, 2 Anstr. 498.

(2) *Sandys v. Eastmond*, Show. R. 192. Gwm. 558.

(3) *Underwood v. Gibbon*, Bumb. 3. Pothill v. May, Gwm. 1571. 1 Bulstr. R. 171. per Hale, in *Dacres v. Duncomb*, 1 Vent. R. 235. *Laurking and Wilde's case*, Poph. R. 126. *Degge*, 248. *Gibson v. Camp-*

bell, 4 Wood's D. 114. See *Vid. Jones v. Calvert* in 1715. and *Stell v. Ash*, Trin. T. 1727. also *Anon*, Hil. T. 1728.

(4) *Thorp v. Bendlowes*, 3 Wood's D. 38. Gwm. 899.

(5) *Guilbert v. Eversley*, Hard. R. 35. *Willis v. Hervey*, 3 Wood's D. 199.

But for animals paying no other tithe, though less than a year on the land.

It has been stated that this tithe must be paid in proportion to the value of the herbage eaten by animals paying no other tithe, and is due though the animals are not a year upon the land. Thus sheep brought into a parish after shearing-time, and sold or killed unshorn⁽¹⁾, though altogether less than one year in the parish, must pay agistment tithe⁽²⁾; nor will sheep which pay the wool tithe be exempt from agistment tithe, except in the year in which they pay such wool tithe.⁽³⁾ And if there is a succession on the land, though all the sheep from time to time sold or removed are immediately replaced by others, so as to have at the shearing-day as many as at any one time have ever been upon the land, their wool tithe will not exempt from the agistment tithe what in the course of the year have been sold or removed.⁽⁴⁾

It has been said, that, in these cases, the tithe year ends at shearing-time, and the tithe of wool which is then paid is in satisfaction of the tithes of the past year, and not of any that may thereafter accrue. But the rule equally holds where sheep, after shearing-time, were fed five months on turnips, and then sold to the butcher:

⁽¹⁾ *Smith v. Johnson*, Gwm. 607. *Fitz. N. B. D.* 118.

⁽²⁾ *Howes v. Carter*, 2 *Anst.* 500. *Bennet v. Peart*, 4 *Wood's D.* 236.

⁽³⁾ 1 *Roll. Abr.* 647. l. 20. *Com. Dig. Tit. Dism. H.* 5.

⁽⁴⁾ *Bateman v. Aistroppe*, Gwm. 1048.

though, as before, a like quantity of new sheep were brought in before shearing-time again, so that the tithe-owner had the tithe wool of the full number; yet an agistment tithe, for depasturing the sheep on the turnips, was decreed him ⁽¹⁾: nor will the plea that turnips are sown on sandy soil, or fallow ground, for the purpose of meliorating the land for corn, and thereby giving the tithe-owner *uberiores decimas* ⁽²⁾; nor that sheep are folded as a necessary manure for the soil, and fed with turnips and vetches on land which has that year before paid the tithe of hay, in any degree avail the opposers of the payment of this tithe. ⁽³⁾ A new increase arises; on that increase the tithe is claimed ⁽⁴⁾; and even if turnips are cultivated on land after the tithe of corn has been taken, and *fed on* by sheep or lambs after the tithe of their wool has been received ⁽⁵⁾, it is now clearly decided, than an agistment tithe for the turnips eaten must be paid. ⁽⁶⁾

Hence it follows, that the same land may pay tithe, not only once, but several times within the same year, the true principle being, that the

Same land
tithable
several times
in one year.

⁽¹⁾ Coleman v. Barker, Gwm. 665. Dummer v. Wingfield, 1 Wood's D. 273.

⁽²⁾ Daniel v. Tuffnall, Gwm. 537.

⁽³⁾ Howes v. Carter, 2 Anst. 500. 4 Wood's D. 450.

⁽⁴⁾ 1 Roll. Abr. 462.

⁽⁵⁾ Swinfen v. Digby, Bumb. 314. Baker v. Sweet, Bunb. 90. Vin. Abr. Tit. Dis. 589. Com. Dig. Tit. Dis. 90.

⁽⁶⁾ Humphreys v. Stopher, Gwm. 593. Coleman v. Barker, Gwm. 665. Gilb. Eq. R. 231.

owner of the tithe is entitled to a tenth part of the produce of the land ; and, consequently, that as often as there is a new increase, so often a new tithe becomes due. Every day yields some tithable matter, either personal, predial, or mixed ; and tithes may be properly said to arise therefore *de die in diem*. ⁽¹⁾ If ground is eaten with mixed cattle, such as profitable and barren or unprofitable, tithe in kind is payable for the profitable, and agistment tithe for the rest ; but in this, as in all other cases, the usage of the place must be observed. ⁽²⁾

Tithe of lambs or wool may be due in one parish, and tithe of agistment in another.

Payment of tithe of lambs or wool in one parish, will be no answer to the claim of agistment tithe in another. Thus, in a bill, by a rector of one parish, for the agistment tithe of sheep which were shorn and dropped their lambs in an adjoining parish ; as the lands where the sheep were fed were in the common fields belonging to both parishes, it was argued, that it would be double tithing if the owner, having paid tithe of wool and lambs in the parish where they had dropped their young, and were shorn, should also be compelled to pay agistment tithe to the rector of the other parish : but the court said, that it was an inconvenience which the defendant had brought upon himself by not shearing a pro-

⁽¹⁾ *Aynsley v. Wordsworth*,
2 Ves. and Bea. 335.

⁽²⁾ *Degge*, c. 5. 249. *Smith v. Johnson*, Bunb. 1.

portionable number of his ewes, and letting them year their lambs in that parish where the tithes were claimed. (1)~

Yet if the sheep had been agisted part of the year in a common in one parish, appurtenant to a farm in another, the agistment tithe would not then have been due to the tithe-owner of the former parish, although the sheep had been all shorn in, and the tithe of wool wholly paid to the tithe-owner of the latter, as this common would be considered as part of the entire farm. (2) For the tithes of commons appendant or appurtenant to farms, belong to the tithe-owners of those parishes where the farms lie to which they are appendant or appurtenant, being parts of them, and passing incidentally with them. (3) So much so that the purchaser of an estate free from rectorial tithe, with a right of common annexed thereunto, is not liable to pay tithe in respect of the allotted land in lieu of the common, afterwards enclosed under an act of parliament. For as no tithe was payable before the enclosure act in respect of the cattle feeding on the common land, no tithe is payable in respect of the land allotted to the owner of the estate in

Of commons
appendant or
appurtenant,
where their
tithe payable.

(1) *Hatfield v. Rawling*, in
notis, Gwm. 1030.

(2) *Ellis v. Fermor*, Gwm.
1022. 3 Wood's Dec. 381.

(3) *Lambert v. Cumming*,
Bunb. R. 138. Gwm. 647.
Sir H. Etherington v. Hunt,
Gwm. 1598.

lieu of such right of common. (1) It is otherwise of commons in gross.*

By whom
agistment
tithes of
common
land payable.

In general, where common land is depastured, the owner of the cattle must pay the tithes, the owner of the soil receiving no profit from it (2); and if the parish in which the common lies is not clearly known, the owner of the animal is, by express provision of the legislature, to render them to the tithe-owner of that parish wherein he lives. (3)

Of the mode
of payment
for the tithe
of agistment.

The next, and not the least important question on this subject, relates to the quantum that the tithe-owner should receive for the tithe of agistment. Writers, whose names almost carry with them conviction, have held, that the tenth of the total, or of the improved value, should be paid: that is, that when barren or unprofitable animals are sold, the tenth of the sum total for which they are so sold should be given to the tithe-owner of the parish wherein they have been

(1) *Steele v. Manns*, 5. Barn. and Ald. 22. *Lord Gwydir v. Foakes*, 7 T. R. 641. *Stockwell v. Terry*, 1 Vez. 118. *Moncaster v. Watson*, 3 Burr. 1375.

(2) *Fisher v. Leman*, Bumb. 3. in notis. *Pory v. Wright*, Hard. 184.

(3) 2 & 3 Edw. 6. c. 13. § 3.

* This principle was decided in the assessment of the land tax, on a writ of error from C. B. to the court of Queen's Bench, *Rex v. Fox*. Hil. 4 Ann. B. R. Rol. 78. in error. Vide *Qwm.* 1027.

red; or that if they have been purchased at a certain age, and are afterwards sold, he should have the tenth of the improved value. But here the good or ill fortune of the farmer, the judgment of the grazier, the skill or ignorance of the butcher, would clearly have too much influence in a question of itself ever vague and uncertain.⁽¹⁾ Besides which, it appears that the improved value of the animal cannot be brought into the estimate, the tithe not being for the animal, but for the value of the tenth part of the herbage eaten by it; equally due, therefore, whether the animal improves, or, on the other hand, becomes lean, and even ultimately dies; where cattle are fattened on oil cakes, as there is no herbage eaten, there can be no agistment tithe due for them, and their improvement cannot be estimated.⁽²⁾

But how is this value to be determined? The few authorities on the point appear chiefly to regard the yearly value of the land, sometimes allowing eighteen pence⁽³⁾, or more generally, perhaps, two shillings in the pound.⁽⁴⁾ Yet in the case of *Startup v. Dodderidge*⁽⁵⁾, an

(1) *Willis v. Harvey*, 3 Wood's D. 196.

(2) *Ellis v. Saul*, 1 Anst. 342.

(3) *Johnson v. Firebrace*, Gwm. 660.

(4) *Holbeech v. Whadocke*, Hard. R. 164. *Smith v. Johnson*, Buab. 1. *Gulbert v. Eversly*, Hard. 35.

(5) Gwm. 587.

annual payment of two shillings in the pound, according to the value of the rent, was decidedly rejected as void against the occupier. For the quantum of rent is not within the conusance of the tithe-owner ; it is moreover oftentimes in the power of the occupier to diminish his rent, by paying a large fine, so that the tithe-owner would thereby get next to nothing.

Best mode
of regulating
the payment.

The more equitable mode seems to be, to regulate the quantum of tithe by the cost of keeping the animal on the herbage, the tenth of which cost should be given to the tithe-owner. *Decimæ persolvantur secundum numerum animalium et dierum.* In tithes, as in every thing else, the value or sum due will be most easily understood, by inquiring what the article in question is worth at that time. Thus, if the cost of keeping an animal one year is worth two pounds, the agistment tithe due to the tithe-owner is four shillings ; and if the second year it would be worth seventy shillings, the tithe is seven shillings ; and so of other years, weeks, and days.

In suits for
agistment
tithe, a loose
mode of lay-
ing a demand
insufficient.

In suits for the tithe of agistment, a loose mode of laying the demand will not be sufficient. The particular animals which have fed on the herbage, for which the tithe is claimed, should be specified. Thus, in a bill for the tithe of agistment of sheep, the demand being laid for the agistment, of barren and unprofitable cattle ; as

sheep, in common language, are not included in the term, the court refused to direct an account as to the agistment of them, considering it too loose a mode of laying the demand. (1)

Proof of the endowment of the small tithes is sufficient to support a demand of agistment tithe, although it has never been received before (2); and a vicar, proving perception of small tithes, (where the rector or impropriators have never received other tithes than those of corn and grain), is entitled to demand tithes of agistment, although such tithes have never before been received by his predecessors, and the documentary evidence adduced in support of his claim, refer to small tithes generally, and not to all small tithes; and this though it appears that a pension or portion is payable out of the vicarage to the superior. (3) For though agistment tithe has not, in most places, been required to be paid, till within a recent date, yet the tithe itself is as old as the tithe of hay, and this species of payment may have existed in very ancient times (4); nevertheless it cannot be claimed under an old grant from the crown of "grain, hay, and *herbage*," where

Proof of the endowment of small tithes sufficient to support a demand for agistment tithe, though it has never been before received.

(1) *Turner v. Williams*,
3 *Anst. R.* 829.

(2) *Byam v. Booth*, 2 *Price's*
Rep. 231.

(3) *Kennicott v. Watson*,
2 *Price's Rep.* 250.

(4) *Williamson v. Lord*
Lonsdale, *Dan. R.* 62. 5 *Pr.*
R. 38.

there does not appear to have been any perception or enjoyment of this specific tithe. ⁽¹⁾

⁽¹⁾ *Scott v. Lawson*, 7 Fr. R. 267.

SECTION III.

Of the Tithe of Corn.

Corn, in
what state
tithable.

THE tithe of corn is a predial great tithe, and is, in general, unless where the custom of the place is otherwise, tithable in the sheaf. ⁽¹⁾ It must be tithed, says Lord Ellenborough, in the first convenient state in which the tithe can be collected after the corn is cut, which is in sheaves. Where, however, tithe corn has been paid in any other manner, such as, by gathering the sheaves into shocks ⁽²⁾, or making them into cocks ⁽³⁾, the custom must be observed, and in that manner it must still be paid. ⁽⁴⁾

It has been said, that if there is a custom to measure forth to the tithe-owner the tenth part of the corn standing, the custom should be observed. ⁽⁵⁾ Such a custom would however now

⁽¹⁾ *Ledgar v. Langley*, 1 Sid. 283. *Bennet v. Shortwright*, Cro. El. 206. *Bird v. Adams*, Sav. 100. *Stebbs v. Goodlock*, Moore. 913. *Lamb. v. Tattersall*, Gwm. 778. 2 Wood's Dec. 418. *Knight v. Halsey*, 7 Term. R. 93.

⁽²⁾ *Archbishop of York v. Sir M. Stapleton*, 2 Atk. 136.

⁽³⁾ *Wats. C. L.* 540.

⁽⁴⁾ *Degge*, c. 3. 235.

⁽⁵⁾ *Bohun on Tithes*, ch. 36.

in all probability, be considered as void; it is quite impossible for the tithe-owner to collect a fair tenth by any such admeasurement, and a fraudulent opening is made, or rather presents itself to the occupier, such as the partial manuring or sowing particular lands or spots. Hence, though by the civil law the tithe-owner may be entitled only to the tenth ridge ⁽¹⁾, it is presumed that, by the common law, corn must be cut, and collected into equal portions, before it can be tithed. ⁽²⁾

Must be cut and collected into equal portions.

In many counties, barley and oats are never collected into the sheaf; they are then tithable in the cock, which is the first state in which they become of equal size, so as to be capable of comparison, and not in the swath, from which it is impossible to collect the right proportion. As custom supersedes the common law in obliging the occupier, in many cases, to render his corn to the tithe-owner in some ulterior process, or to advance it another stage in the course of husbandry; so will custom also allow him an adequate consideration for his trouble. Thus, where a farmer usually put the sheaves into shocks, and, in case of bad weather, opened them when dry, this benefit, together with the additional labour by the farmer, was held a

If not collected into the sheaf, then tithable in the cock, but not in the swath.

The eleventh instead of the tenth sheaf sometimes payable by custom.

(¹) 2 Leon. R. 70.

C.L. 539. *Ledgar v. Langley*,

(²) Degge, c. 3. 236. Wats. 1 Sid. 283.

good consideration to support the custom of rendering the eleventh instead of the tenth shock. ⁽¹⁾

Consideration need not be accurately balanced.

Nor is it necessary that this consideration should be accurately balanced between the tithe-owner and the occupier, that there should be always an exact *quid pro quo* in these compensations. It is enough to shew that there is a consideration for the deduction. Where the farmer does more than the law compels him, the law gives him often the privilege of paying less, and whether there has been a little more advantage on one side or on the other is immaterial. ⁽²⁾

Of the quantity to be cut down at one time.

The quantity that should be cut down before tithing, and the subject of notice, have been fully entered into in a former chapter. The mode of tithing corn comes under the general rule. A reasonable quantity must be cut down, ready to be tithed at one time, enough at least for a load, where the size of the field will admit of it, and if it will not, the whole field should be cut down. When the weather is unusually variable—the land liable to floods—some of the crop ripe—the remainder otherwise—or the field sown with different kinds of grain—the rule, as was before mentioned, naturally admits of ex-

⁽¹⁾ Smyth v. Sambrook, 1 Maule and Sel. 66.

⁽²⁾ Cockburne v. Hughes, and others, 3 Pr. R. 428.

ceptions. (1) In a late case, where a farmer gave a general notice to the tithe-owner that he should begin to reap on a certain day, or as soon after as the weather would permit, and, before tithing, put all the sheaves when bound immediately into large shocks or riders, each consisting of ten sheaves, of which four were set on their ends against four others, with two covering sheaves placed roofwise on the top, for the purpose of protecting the whole against the weather, from which shocks the tenth sheaves were afterwards drawn, without taking the roof of the shock to pieces, and the remainder of the shocks was removed by the farmer in two hours afterwards, it was decided that the tithe-owner had thereby no reasonable opportunity of comparing the tenth sheaf with the other nine, which he ought to have had; and that as corn ought to be tithed in the sheaf, before it is made up into shocks or riders, this manner of tithing was vicious in its principle, the tithe-owner being excluded from seeing a great part of the heap, and thereby making a fair comparison. (2)

(1) Hall v. Machet, 8 Anst.
915. Erskine v. Ruffle, Gwm.
961.

(2) Shallcross v. Jowle,
13 East R. 261.

SECTION IV.

Of the Tithe of Flax, Hemp, and Saffron.

Flax, hemp,
and saffron,
small predial
tithes.

Five shillings
per acre due
for these
tithes.

It has been already observed, that the tithes of flax, hemp, and saffron are small predial tithes. In order to encourage the growth of the two former articles, and in consideration of the difficulty that necessarily attends the manner of tithing them, the legislature has enacted, that any person sowing hemp or flax shall pay to the tithe-owner the sum of five shillings yearly, and no more, for each acre of land so sown, before the same is carried off from the ground, for the recovery of which the tithe-owner has the usual remedy at law. ⁽¹⁾

Where the produce of land had, for a series of years, paid tithe to the rector, on the occupier's cultivating the land with saffron instead of corn, it was argued that the tithe of saffron was also due to the rector. This article, however, comes under the class of *minutæ decimæ*, and as such is due to the vicar. Indeed, the length of time that land has paid tithe to a rector, can never be any bar to the vicar's claim, when the land is converted to the cultivation of any other article different in its nature and use. ⁽²⁾

⁽¹⁾ 11 & 12 Will. 3. c. 16. | Moore. 909. Cro. El. 467.
1 Geo. 1. st. 2. c. 26. | Dean and Chapter of Nor-

⁽²⁾ Bedingfield v. Feak, | wich, Ow. R. 74.

SECTION V.

Of the Tithe of Hay.

OF common right, the occupier of land is not obliged to make his grass into hay. It is not tithable in the swath, but in a state when it can neither be called grass nor hay; namely, in those cocks into which it is first collected after cutting and tedding. (1)

Hay tithable in those cocks into which it is first made after cutting and tedding.

The general rule is here strictly exemplified, that the right of the tithe-owner to take the tithes accrues in the earliest stage of the course of husbandry applicable to it, when the tenth part can be distinguished from the other nine. (2) Having been once tedded or fairly thrown abroad from the swath; it may then, but not until then, be collected into cocks and tithed. (3) Indeed Mr. Justice Le Blanc said, that it cannot be tithed in the swath; but after it has been tedded and divided into grass cocks, when the tenth part may be properly distinguished from the rest, it is then tithable, though it may be more convenient, in many instances, to put it first into hay cocks, but *that can be only done by con-*

(1) *Hallewell v. Trappes*, 2 Bos. and Pull. 172. 7 T. R. Taunt. 55. 2 New. Rep. 178. 86.

Fox v. Ayde, 2 P. Wms. 520. (3) *Newman v. Morgan*, 1 Campb. N. P. R. 305. 10

(2) *Knight v. Halsey*, 2 East, R. 5.

sent. (1) The whole ground must in that stage be fairly cleared, and a custom to put it into cocks, without raking round them, is therefore void (2); and this tithe must be paid, notwithstanding beasts of the plough, or pail, or sheep, are fed therewith. (3)

Of clover, tares, and vetches; when cut green, and given to agricultural animals.

Clover, tares, vetches, and lucern are tithable in the same manner as hay, as well therefore in their second as in their first crop. (4) Where these or similar articles are cut when green, and then carried from the swath, and given to animals employed in the purposes of husbandry, there are several cases that state the produce thus cut, and eaten green by agricultural cattle, is not tithable. (5) In latter cases, however, the court, on this kind of discharge being claimed, ordered an inquiry whether the occupier had *any other fodder* or sustenance to support his cattle without the green fodder that had been

(1) *Shallcross v. Jowle*, 13 East, 268.

(2) *Staughton v. Hide*, Gwm. 566. *Howard v. Bovingdon*, 4 Wood's Dec. 546. *Franklyn v. Gooch*, Gwm. 144. 3 Anstr. 682. *Tyler v. Bearblock*, before the Master of the Rolls in 1822, and before Wood. B. Essex Spring Ass. 1822.

(3) *Webb v. Warner*, Cro. Jac. 47.

(4) *Collyer v. Howes*, 3 Anstr. 954. *Pomfret v. Lander*, Gwm. 530. *Wallis v. Pain*, Bunb. 344. *Witherington v. Harris*, Gwm. 584.

(5) *Perry v. Soam*, Cro. El. 139. 2 Leon. 27. 1 Roll. Abr. 645. *Collyer v. Howes*, 4 Wood's Dec. 440. *Hayes v. Dowse*, Bunb. 279. Gwm. 679. *Webb v. Warner*, 3 Burns. Ecc. L. 447. Cro. Jac. 47. *Crawley v. Wells*. 1 Roll. Abr. pl. 7.

thus used. (1) We have now, says Richards, C. B. the law as clear as can be; there must not be any other fodder in order to excuse the occupier from paying the tithes for green grass and tares, which he has given to his cattle, admitting the principle, that this produce, as well as any other produce of the earth is tithable; so that, *prima facie*, it is tithable at all events, if you have other fodder. Now other fodder means exactly what food means. (2) It appears, therefore, that a person would not be permitted to cut grass, and give it green to his agricultural animals, without its being tithed, provided he had other food at the same time, with which he could supply them. *

(1) *Mantell v. Paine*, Gwm. 1505. 4 Wood's D. 566. *Steven v. Aldridge*, Oxford Sum. Ass. 1817.

(2) *Dorman v. Currey*, 1 Dan. Rep. 201. *Dorman v. Sears*, and others, 6 Price, R. 338.

* De herbâ viridi, etiam non siccata, si sic sumatur, vel necessaria sit ad pabulum animalium vel bestiarum, *solvenda* est decima. Lind.

SECTION VI.

Of the Tithe of Herbs, Roots, Vegetables, Flowers, Acorns, Seeds, and Hot-house Plants.

Of common right, tithes are due for herbs, roots, vegetables, plants, fruits, and flowers; under which head may be classed parsley, sage, onions, potatoes, cabbage, carrots, turnips, annis,

Of the tithe of herbs, roots, vegetables, plants, fruits, and flowers.

mint, rue, apples, gooseberries, pears, plums, cherries, currants, lily-flowers, and the like, all of which are small tithes, and may be demanded in kind, even where they are gathered by some other person than the owner, unless stolen, though, in most places, some pecuniary consideration is generally given for them. ⁽¹⁾

All small
tithes.

It has been before stated, that however cultivated, whether in gardens, commons, large or small fields, these and similar articles are alike small tithes. A general rule has been laid down, and for the sake of certainty, it must be adhered to. The argument that the occupier has it in his power to change the property, and sow whole fields with any of these articles instead of corn, is not a sufficient objection to the principle. Tithes are a fluctuating uncertain inheritance, and depend entirely upon that course of husbandry which the occupier chooses to adopt. ⁽²⁾

Mode of
setting out
the tithe of
potatoes and
turnips.

The tithe of potatoes and turnips must be set out in any state wherein the tithe-owner is enabled to arrive at a fair and just comparison of his proportion. The occupier is not obliged to

⁽¹⁾ 2 Inst. 252. Gibs. Cod. 680. 3 Com. Dig. Tit. Dis. H. 10. Cluver v. Pullen, 1 Wood's Dec. 212. Stile's Case, Lit. R. 147. Chapman v. Barlow, Bunb. 184.

⁽²⁾ Smith v. Wyatt, 2 Atk. 364. Bewick v. Nicholls, 3 Wood's D. 243. Travis v. Gill, 3 Wood's D. 372. Turton v. Clayton, 2 Wood's Dec. 180.

bestow more labour than the nature of the thing requires for the benefit of the parson; if the farmer does not put them into heaps for himself, a court *might* perhaps hold that he need not do so for the tithe-owner ⁽¹⁾; but ridges and furrows are generally unequal in a field, and the fairest way seems to be to set them out in heaps of equal magnitude on the spot where they are dug; tithing them by the single potatoe or turnip is liable to fraud; a great difference generally exists in the size of each, and the occupier is not allowed to bring them home, and there measure them for the tithe-owner. ⁽²⁾

Where they are drawn to feed cattle, and not put into heaps by the occupier himself for his own purposes; it will not be necessary to gather them into heaps for the tithe-owner, but it will be sufficient if every tenth turnip is thrown aside, as drawn, on a ridge opposite for the tithe-owner, as no person is obliged to bestow more labour than the nature of the thing requires for the benefit of the tithe-owner. ⁽³⁾ They are payable though cultivated on land which has yielded the tithe of corn before the same year, and in their second as well as first crop, though

When drawn
to feed cattle.

Payable
where land
has been cul-
tivated the
same year
with corn.

⁽¹⁾ Newman v. Morgan, 10 East R. 11. and 12. history of potatoes, see a curious note in Gwm. 1216.

⁽²⁾ Beaumont v. Shilcot, Gwm. 945. Bosworth v. Limbrick, Gwm. 1101. For the ⁽³⁾ Newman v. Morgan, 10 East R. 12. Blaney v. Whitaker, 10 East, 12.

the object in raising such second crop is entirely for the sake of meliorating the soil for the following year. ⁽¹⁾

Of the tithe
of acorns.

Acorns or masts, under which latter word were included most of those articles which the old laws call pannage, or the fruits of the forest, on which swine were accustomed to feed, are tithable according to Lord Coke, because they renew yearly ⁽²⁾; if, however, they are not gathered, but left as wild fruit under the tree to be eaten by hogs, no tithe is due for them. ⁽³⁾ Like other articles, the tithe of acorns is payable in the first state into which they can be collected in equal portions after severance from the tree.

Of the tithe
of seeds.

The tithe of seeds is a small predial tithe, and payable only when no tithe is taken of the herbs or plants themselves. ⁽⁴⁾

Of the tithe
of hot-house
plants.

It is a question of some importance, whether pine-apples, grapes, melons, and hot-house plants in general, are tithable or not. The leading case upon this subject, which was brought before the House of Lords, and ultimately went

⁽¹⁾ *Bordley v. Tims*, Gwm. 540. *Hall v. Filtz*, Gwm. 606.

⁽²⁾ 2 Inst. 643. 11 Rep. 49. a.

⁽³⁾ Anon, Het. 27. Lit. B. 40.

⁽⁴⁾ 3 Com. Dig. Tit. *Dis.* H. 10.

off upon another point, is *Adams v. Waller*. ⁽¹⁾ It was then very ably argued, on the one side, that the produce of a hot-house is not the produce of the earth; that if tithe is payable for such productions, it must also be for those of pots in a house, sallad raised on a flannel; and that things, not the produce of the soil and climate, cannot be tithable ⁽²⁾: on the other side, it was observed, that every thing raised in a garden is principally in consequence of manure and labour, and yet tithable; that cucumbers were never objected to; that cherries, walnuts, cabbages, and potatoes are all exotics; that the expense could be no objection, as it would have excluded cabbages and most other things; and that hereafter the raising pines may cease to be expensive. ⁽³⁾ In the judgment delivered in the Exchequer, Skynner Lord C. B. said — “As to melons, pines, &c. I know not how to draw any line between them and other produce of gardens. What is the tithe of gardens? It is predial. The notion of artificial heat and soil would exclude almost all the produce of gardens: things raised under glasses are raised in an artificial soil; but they must all be subject to the same rule. Inoculation, to be sure, is a work of art; but art and expense used will not

⁽¹⁾ *Adams v. Waller*, Gwm. 1204. 4 Wood's Dec. 159.
7 Bro. P. C. 63 2d ed. by Tom-
lins, called *Hewit v. Adams*.

⁽²⁾ By Macdonald, Kenyon
and Selwyn.

⁽³⁾ By Mansfield.

make any difference." So Eyre, Baron, added—
 " Hot-house plants are certainly not exempt. The like hardships occurred in wastes, madder, &c.; but an act of parliament was necessary to exclude the right of the parson. The general rule is clear, and the inconveniences attending it are not great; and mutual inconveniences will suggest mutual moderation; if not, a court of justice cannot help it." Hence we may probably conclude that the produce of hot-houses, like that of gardens, is, *de jure*, tithable. (1)

SECTION VII.

Of the Tithe of Hops.

Tithe of hops, a small predial tithe.

THE tithe of hops is a small predial tithe (1), and being an article of recent introduction into the kingdom, that is, since the time of legal memory, no long practice nor custom of rendering any thing in lieu of them can be effectually maintained. (2)

(1) Worrall v. Miller and Sweet, 3 Anst. 632. Gwm. 1436. more fully reported in Plowden on Tithes, p. 190.

(2) Uvedall v. Tindall, Hut. R. 78. Legard v. Elcocke, 2 Keb. 36.

(3) Crouch v. Ridsen, 1 Sid. 443. Gee v. Pearch, 1 Wood's Dec. 386. Hops began to be used in this country in the reign of Queen Elizabeth. Chapman v. Smith, Gwm. 864. 2 Vez. 506.

It was formerly held, that the *modus expouendi*, or mode of setting forth this tithe, may differ in different parishes, and that any manner by which the tithe-owner can conveniently receive the tenth of the produce of the hop grounds must be sufficient.⁽¹⁾ It seems, however, now perfectly settled, that the regular and usual mode of tithing hops is by taking the tenth measure after they are picked, and before they are dried.⁽²⁾ This is quite consonant to the rule that has been laid down for taking other predial tithes, namely, that the article is to be collected in the earliest stage, when the tenth part can be fairly and visibly distinguished from the other nine.

How tithable.

The chief question that has been agitated on this subject is, whether a custom or old practice of sixty years or thereabouts, in particular places, of paying tithe hops in some other manner — such, for instance, as the tenth row when the rows were equal, or if otherwise, by the tenth hill — could be allowed in opposition to the general rule.

No custom or usage can vary the rule.

In an old case, where an ancient usage was said to prevail in a parish, that the tithe-owner

(1) *Ledgar v. Langley*, 2 Wood's D. 146. *Stedman v. Lye*, 1 Lord Raym. 504.

(2) *Bate v. Spracking*, 1 Roll. Abr. 644.
Burb. 20. *Bliss v. Chandler*,

was obliged to accept the tithe hops by the tenth pole or hill, after the vines were severed from the ground, and stripped off the poles, an issue was certainly sent to a jury, but the custom was pronounced bad. (¹) In two later cases, where this point was again argued, it was also held that the tithe ought to be set out after the hops are picked from the bind or stem. (²) It was said, on the one side, that as local usages are permitted in the mode of setting out other articles, so ought they to regulate the manner of setting out the tithe of hops; on the other it was argued, that hops are an article of modern introduction, cultivated since the time of legal memory, and that, though reasonable usage may locally supersede the common law, and introduce a different rule, yet the common law cannot be different in one place from what it is in another. Hence, upon the latter principles, a late case has set the subject decidedly at rest, and confirmed the doctrine that hops are tithable by measure, after they have been picked from the bind, and that no usage can vary the rule. (³)

Tithe of hop poles.

It may be here observed, though perhaps more properly belonging to a subsequent section, that

(¹) *Sneyd v. Unwin*, 2 Wood's Dec. 403.

(²) *Tyers v. Walton*, Gwm. 841. *Sneyd v. Unwin*, 2

Wood's Dec. 477. In *notia*. Gwm. 775.

(³) *Knight v. Halsey*, 7 T. R. 86. 2 Bos. & Pull. 172. Vide Campb. N. P. R. 308.

it has been said that no tithe is due for the poles used in a hop garden, the tithe of hops having been taken. The point does not appear to have been at present decided, and the cases are altogether contradictory. It seems, however, to be the better opinion, that tithes for hop poles are not due, on the principle *per quod decimæ fiunt uberiores*.⁽¹⁾

SECTION VIII.

Of the Tithe of Peas and Beans.

THE tithe of peas and beans is a great predial tithe, whether sown in large or small quantities.⁽¹⁾ Neither the manner of cultivating, nor the time of gathering these and similar articles, as has been already stated, can affect the nature of the tithe in question. Thus, when sown in fields, and gathered from the stems and stalks by gardeners who sell them green in the pods, they are nevertheless great tithes, and due to the rector of the parish.⁽²⁾ They are indeed of the nature of all other kind of grain. It is

Tithe of peas and beans a great predial tithe.

(¹) *Bate v. Spracking*, 2 Wood's Dec. 87. *Bunb.* 20. *Gee v. Perch*, Gwm. 563. 1 Wood's Dec. 386. *Degge*, c. 4. 246. 2 Inst. 652.

(²) *Gumley v. Burt*, Bunb. 169. *Awdry v. Smallcombe*, Gwm. 1526.

(³) *Newton v. Bird*, 2 Wood's Dec. 34.

most probable, that in former times they were garbed, or bound up like barley and oats; at all events they are of a nature capable of being so bound together; and therefore an endowment to a vicar, giving him all the tithes of the parish, *præter decimas garbarum fœni et molen-dini*, does not extend to the tithe of these articles. (')

When applied to the sustenance of the occupier and his family.

Another distinction has been taken by most writers from the application of peas and beans to the sustenance of the occupier and his family. A very learned modern writer states, "that if the occupier gather them green to spend in his house, where they are accordingly eaten by the family, no tithe shall be paid of them by the law of the land, without the aid of a local or particular custom to effectuate the exemption." (') There are, undoubtedly, many authorities in support of this doctrine, and an exemption from the payment of tithes, in consequence of the consumption of the articles in the occupier's family, has upon many occasions been permitted. (3) It must, however, be observed, with all due deference to such autho-

(') *Sims v. Bennet*, Gwm. 875.

(2) *Toller on Tithes*, ch. 4. 119.

(3) *Hele v. Bragg*, Gwm. 861. 1 *Roll. Abr.* 647. *Baldwin v. Atkinson*, 4 *Wood's Dec.* 48. *Robinson v. Tun-*

stall, Gwm. 861. *Facy v. Long*, Cro. Car. 237. *Underwood v. Gibbon*, Bunb. 3. *Rookett v. Gomershall*, Lit. 367. *Austin v. Lucas*, Moore, 909. *Tilden v. Walter*, 1 *Sid.* 447. *Anon.* Gwm. 428.

rities, which with a court might probably still have their influence, that the principle of the law of tithes can hardly admit of so loose and general an exemption.

Is it meant that all articles cultivated alone for the use of the occupier's family are to be exempt from tithe? If so, the agriculturist who farms his little domain for that purpose only, will live entirely tithe-free, and the land, the tenth part of the produce of which has been for centuries the property and in the perception of the tithe-owner, at once becomes exempt from the payment of tithes; and supposing the parish inhabited by six or seven persons of this description, the tithes thereof are gone. But if, on the other hand, certain articles are to be exempt on this account, where is the line to be drawn, and on what principle is it that a court can know where to pause? "I know no case," says Lord Hardwicke, "where things not originally tithable in their own nature shall become so liable by the subsequent use of them: the subsequent use of a thing, as it alters not its nature, cannot add to it a tithable quality which it had not before; if it could, why should it not hold *vice versâ* ? (')

The subsequent use of an article cannot alter its tithable quality.

It seems doubtful, therefore, whether an exemption upon such principles would now

(') Walton v. Tryon, Amb. R. 130. Gwm. 821. Vide Sims v. Bennett, Gwm. 889.

be permitted. Indeed it has been once held, that a custom to exempt from the payment of tithes such peas and beans as were gathered green, and used in the family of the owner, in consideration that he should set out the tithes of the residue respectively in poaks and sheaves, at his own expense, was bad; the court, by entering into the consideration of the custom, implying that there was *de jure* no such exemption⁽¹⁾; and in the case of *Williamson v. Lord Lonsdale*, in February one thousand eight hundred and eighteen, in the Exchequer it was decided, that potatoes and turnips consumed in the family of the grower are liable to tithes; Lord Chief Baron Richards then having said, "I shall get rid of one part of the case, because it is sufficiently clear. The defendants claim an exemption from the payment of the tithes of potatoes and turnips if used in the family; and in support of this claim, the case of green peas has been alluded to; but as that is a solitary exemption, and as I cannot find a case which says, that potatoes and turnips grown upon different parts of the farm, but consumed in the family, should be exempted from tithes, I am not inclined to extend it further."

Of the manner of setting them forth.

These articles are to be set forth according to the general rule before laid down, namely, in the first stage in which they become of equal parcels,

⁽¹⁾ *Pearse v. Hall*, 2 Wood's Dec. 456.

so as to be capable of comparison. It is not clearly decided in what that state is; and in *Mantell v. Paine*, it was said by the Chief Baron, that there was no method of tithing them laid down in the books. (¹) It appears, however, from what dropped from Lord Ellenborough and Mr. Justice Bayley in a very late case, that it is the duty of the occupier to collect them into cocks, which seems to be the first stage in which they are tithable; and that the mere putting them into wads, which is little more than severing them from the root, is insufficient. (²)

Must be collected into cocks.

SECTION IX.

Of the Tithe of Wood.

IN consequence of a canon made in the seventeenth year of the reign of Edward the Third, by Stradford Archbishop of Canterbury, ordaining that the tithe of all kind of wood should be paid within the province of Canterbury, before which period wood was only tithable by particular custom (³), several petitions were successively exhibited by the commons in parlia-

Canon made by Stradford Archbishop of Canterbury.

(¹) Gwm. 1611.

(²) *Smyth v. Sambrook*, 1 Maule & Sel. 75.

(³) *Hicks v. Woodison*, 12 Mod. 111. Lind. de Dec. lib. 3. tit. 16. p. 189.

ment, praying that the king would ordain a remedy, and that prohibitions might be granted to all who were impleaded of the tithes of wood, without having a consultation.

Great wood,
of twenty
years' growth
or more, ex-
empt from
tithes.

After many ineffectual struggles and remonstrances, in consequence of the joint complaints of the great men and commons, in the parliament of the forty-fifth Edward the Third, a statute was at length passed, exempting from the payment of tithes great wood of twenty years' growth or more, and enacting, that upon a suit commenced in the spiritual court for such tithes, a prohibition should be granted, as had been used before that time. ⁽¹⁾

In an age when the clergy challenged an exemption from all secular jurisdiction — when treason itself was declared to be no canonical offence, nor allowed to be a sufficient reason for deprivation or other spiritual censure — when almost all the learning of the time was possessed by the priesthood, and the chief departments of the government intrusted to their care — and, above all, when the laity, beginning to emancipate themselves from the thralldom in which they had been long encircled, first began to question, to

(1) Rot. Parl. 17 Ed. III. | 45 Ed. III. c. 3. Rot. Parl.
Art. 29. 18 Ed. III. Art. 7. | 47 Ed. III. Art. 9. 50 Ed. III.
and 9. 21 Ed. III. Art. 48. | Art. 141. 2 Inst. 642.
25 Ed. III. Art. 27. Stat.

inquire into, and oppose the power of the priest at home, and the pope abroad — it was not probable that the church would remain silent under any enactments tending to deprive them either of their privileges or revenue. Hence, under the pretence that this was not a statute of sufficient authority, but merely an ordinance, in their subsequent petitions and canons they constantly questioned the authority of the temporal courts ⁽¹⁾; so much so, that in a following parliament the commons again petitioned that it might be enacted, that no tithe should be due for wood above twenty years' growth; and that in all such cases a prohibition might be granted. To which it was answered, that such prohibition should be granted as then-before had been used. ⁽²⁾ This answer, being compared with the conclusion of the 45th Edw. III., has, according to Lord Coke, given such an end to both these points, as no question has been made thereof at any time since ⁽³⁾; and the act has continued to be the rule of decision, prohibitions having been constantly granted to suits instituted in the spiritual courts.

In construing the statute, great difference of opinion formerly prevailed. It was long a question how the words *gras bois*, great wood,

⁽¹⁾ Degge, c. 4. 241. 2 Inst. 643.

⁽²⁾ Rot Parl. 50 Ed. III.
⁽³⁾ 2 Inst. 643.

should be considered; and of what age wood ought to be before it is exempted from the payment of tithe.

Definition of
gros bois.

Lord Coke says, that gros bois signifies specially such wood as either has been or is by the custom of the country timber; and that all such wood, if of the age of twenty years or more, is free from the payment of tithes.⁽¹⁾ This principle has been since confirmed both by the authorities of Lord Hardwicke and Lord Ellenborough. The statute does not import to exempt all wood of twenty or forty years' growth, but such only as comes under the denomination of gros bois, or great wood.

Two things therefore must concur to exclude or privilege wood from a liability to tithes; namely, its being of the specified age of twenty years or more, and its being gros bois.⁽²⁾

What wood
is great
wood, and
what made
so by cus-
tom.

Our attention is naturally led to enquire what species of wood it is that is thus privileged under the title of great wood. In all counties, oak, ash, and elm of twenty years' growth are considered timber, and therefore as such exempt from the payment of tithe.⁽³⁾ The exemption is not, however, confined to wood of this de-

⁽¹⁾ 2 Inst. 642. Fox v. & Sel. 136. Soby v. Molins, Thexton, 12 Mod. 524. Plowd. R. 470.

⁽²⁾ Ford v. Racster, 4 M. ⁽³⁾ Degge, c. 4. 244.

scription; beech (¹), cherry (²), holly (³), aspen (⁴), horse chesnut, lime, walnut trees (⁵), and willows (⁶), are by the custom of the country in many places timber.

Of all timber trees thus exempt from tithe, either by the common law or by custom, it may be observed, as a general rule, that the bark, lops, tops, and cuttings from them are in like manner free, being accessories to an existing privileged principal matter, and from their nature and ordinary use not likely to be cut down in any regular course. (⁷)

When trees exempt, their appendages are also exempt.

It was formerly held, that tithe was not due for the shoots and underwoods which grow out of the roots or stocks of privileged timber trees,

Of the shoots and underwoods which grow out of the roots or stocks of privileged trees.

(¹) *Layfield v. Cowper*, 1 Wood's D. 330. *Bibye v. Huxley*, Bunb. R. 192. *Abbott v. Hicks*, 1 Wood's D. 319. *Aubrey v. Fisher*, 10 East, R. 446. Beech, or buck, from whence the county of Buckingham takes its name, is there always considered as timber.

(²) *Chapman v. Barlow*, Bunb. 183. *Duke of Chandos v. Talbot*, 2 P. Wms. 606.

(³) *Pinder v. Spencer*, Noy, 30.

(⁴) *Wright v. Powle*, Gwm. 357.

(⁵) *Duke of Chandos v. Talbot*, 2 P. Wms. 601.

(⁶) *Guffly v. Pindar*, Hob. 219.

(⁷) *Brook v. Rogers*, Cro. Jac. 100. 1 Roll. Abr. 640. *Layfield v. Cowper*, 1 Wood's Dec. 331. *Lewis Bowle's case*, 11 Rep. 81. *Reynold's case*, Moore, 762. *Stampe v. Clinton alias Liford*, 1 Roll. Rep. 95.

of what age soever⁽¹⁾; the germins and branches from these roots were said to be parcel of the inheritance, and therefore not tithable.⁽²⁾ This doctrine has in later cases been impeached, and overturned. A distinction has been made between the tops of trees growing from others that have been headed and lopped, and germins that grow from the stools of trees entirely cut down. In the former case, the old privileged tree remains, and is, as it were, still the principal matter, and therefore exempt from tithe⁽³⁾; for a tree once privileged never loses that privilege, and therefore, when rotten and cut down for fuel, is not tithable⁽⁴⁾: in the latter, there is no tree left; the wood becomes an entire new wood; great part of the copses or underwoods of the kingdom are germins from such stools of timber trees, and, if not tithable, the clergy would be deprived of the tithe of many underwoods.⁽⁵⁾ The doctrine

(¹) 2 Inst. 643. Liford's case, 1 Roll. Abr. 640. 11 Rep. 47. Ranne v. Patison, Moore, 908.

(²) 2 Inst. 643.

(³) Morden v. Knight, 2 Wood's Dec. 478.

(⁴) Gould's Rep. 145.

(⁵) Walton v. Tryon, Amb. 133. Amler v. Jackson, 3 Wood's Dec. 225. Wallbank

v. Hayward, 3 Wood, 512. In North Wales it is a common practice to cut the wood periodically. A new tree arises from the old root, which is, at the proper period, barked, faggoted, and sold; and no land yields a better profit than the natural growth of the mountains thus cultivated.

thus laid down by Lord Hardwicke may be now considered as quite settled on the additional authority of Lord Ellenborough. In a very late case, the question was, whether oak wood of more than twenty years' standing, growing, not from acorns, as original or maiden trees, but from old stools, which stools belonged originally to trees which had stood more than twenty years, were so clearly entitled to an exemption by the statute, as to make a verdict subjecting them to tithe a wrong verdict; and the Court, after taking time to consider, said, that the exemption, naturally and by legal consequence, embraced whatever constituted a part of gros bois, or timber of the requisite age, but it did not comprehend that which never made a part of or co-existed with the gros bois of the due age, and could not therefore comprehend germins cut before the tree was statutably gros bois, nor the wood growing from the stool on which the gros bois once stood, but stands no longer, or the germins springing from the root of what was once the root of gros bois, but is so no longer.⁽¹⁾

Wood used for building houses, for fencing grounds on a farm⁽²⁾, for fuel burnt in the

Of the tithe of wood when used on the premises.

⁽¹⁾ Ford v. Racster, 4 M. & S. 130. | lins, 1 Saund. 143. 2 Inst. 652. Hetley, 88. Anon.

⁽²⁾ East v. Harding, Cro. | 1 Vent. R. 75. Wats. Cl. L. El. 499. Croucher v. Col- 546.

house⁽¹⁾, or for making bricks for the use of the occupier's houses within the parish⁽²⁾, is said not to be tithable.⁽³⁾ The want of principle in the general idea that the subsequent use of an article, whether wood or any thing else, is to determine its liability to being tithed or not, has been already fully stated in the last section in this chapter. A strong reason should be given for thus allowing an unreasonable distinction and confusion in the law of tithes. An old case seems to put the proper construction on this point; namely, that the discharge from the payment of tithes, in consequence of their subsequent usage, can only be claimed on the principle of special custom, operating by way of exemption in respect of some satisfaction to the tithe-owner, which it lies upon the parishioner to show.⁽⁴⁾ Lord Hardwicke, in his able judgment referred to, strongly supports this doctrine. A custom to be discharged of the tithes of wood used in husbandry, houses, or repairing fences on the premises, may be undoubtedly good.⁽⁵⁾ But does it follow, that because wood is thus

⁽¹⁾ *Thompson v. Holt*, Gwm. 671. *Degge*, c. 4. 243. *Austyn v. Lucas*, Cro. El. 609. *Scoles v. Lowther*, Lord Raym. 129.

⁽²⁾ 1 Roll. Abr. 645. *Thornhill's case*, Hetley, 93.

⁽³⁾ *Roffle v. Harding*, 8 Vin. Abr. 591. *Turner v.*

Weedon, Gwm. 524. *Burlem v. Spencer*, 2 Wood's Dec. 380. *Gould's R.* 161. 3 Salk. 347. Sed vide *Smith v. Williams*, Gwm. 608.

⁽⁴⁾ *Norton v. Farmer*, Cro. Car. 113.

⁽⁵⁾ *Waterman v. Jones*, 1 Wood's Dec. 468.

used, it becomes of common right discharged? If the principle is good on one side, it ought to be so also on the other, and timber, such as oak, ash, and elm, cut for sale, and carried from the premises, or when become dry and rotten from age, and unfit for the usual purposes to which it is in its sound state applied, should be made tithable: a proposition contrary to law.⁽¹⁾ As when wood, which has once acquired its privilege, cannot be rendered tithable in consequence of either its subsequent use or application; so, if by its nature it is incapable of the statutable privilege, it is difficult to see how the application of it can reasonably bring it within it. As custom is to decide what is timber, so may custom operate in exempting from tithe that which is not timber. But to go beyond this rule seems to lead to every kind of uncertainty and fraud. Wood may not be used for several years after it is felled: at the time of severance, it may be impossible for the owner to say to what use he means to apply it: before it is used at all, it may have passed through a number of hands, and the tithes, in the mean time, may have been possessed by many different persons.

Again, if such an exemption is allowable, on what principle is the hearth penny or smoke Hearth
penny and
smoke
penny.

(¹) *Ram v. Patenson*, Cro. | *Moore*, 908.
El. 477. *Broke and Rogers*,

penny constantly paid? If wood thus used was not *de jure* tithable, it seems difficult to understand why any payment should be given in lieu of it.⁽¹⁾

Nevertheless, if wood is used for the promotion and the furtherance of the other tithes, here, as in other cases, an exemption may be allowed on the principle of not permitting double tithing.

Tithe of
broom,
heath,
furze, and
fern.

Thus a prohibition was granted in a suit for tithes of broom, heath, furze, and fern, where it was suggested that the defendant kept a house of husbandry, and used the broom to burn, and the furze to make pens upon his ground for sheep⁽²⁾; the tithe-owner having thereby procured *uberiores decimas*, on which principle alone the occupier appears to be exempted from the payment of tithes on articles otherwise *de jure* tithable.⁽³⁾ Hence, where a prohibition was prayed to stay a suit for tithes of wood, the plaintiff suggested that he had a house in the parish, and the wood was cut for fuel burnt in the house; but the court said, that this would not serve, unless it was expressed that the house

⁽¹⁾ Brinklow v. Edmonds, Bunb. R. 307. Hick v. Woodson, 2 Salk. 655.

⁽²⁾ Dr. Wats. 3 Keb. 635.
⁽³⁾ Rooket v. Gomershall, 1 Litt. 367.

was for maintenance of husbandry, by reason of which the parson had *uberiores decimas*. (1)

It seems therefore not improbable, that on an exemption from the tithe of wood being claimed, in consequence of its subsequent use, the court might inquire whether there was any custom in support of such exemption, or whether the tithes in the parish were thereby increased. The authorities, however, of common right exempting this article when applied to any of the purposes mentioned, are undoubtedly numerous, and many of them, it must be confessed, of such weight, that it may be questionable whether or not they would be disregarded.

Subsequent use of wood.

The tithes of all fruit-trees, whether growing in fields (2), orchards, nursery-grounds, or gardens, are predial tithes, and their fruit tithable when it is gathered, or when it falls from the tree. (3) It has been said, that when tithe is paid for the fruit of trees, if in the same year the trees themselves are cut down and sold, no tithe is due for them. (4) This doctrine, however, must be distinguished from the case of *Grant v. Hedding*, where it was decreed that tithe was due, as well from those trees which yield tith-

Tithe of fruit-trees.

(1) *Tilden v. Walter*. 1 Vent. R. 75. Sid. 447.

(2) *Lister v. Foy*, Gwm. 581.

(3) *Chapman v. Barlow*, Bunb. 184.

(4) *Baxter v. Hopes*, 2 Inst. 621.

able fruit, as from those which produce none. ⁽¹⁾
 So where plants growing in nursery-grounds are
 either given away or sold for the purposes of
 being transplanted into another parish, their
 tithe is due to the tithe-owner of that parish
 wherein they are reared. ⁽²⁾

Of the man-
 ner of setting
 out the tithe
 of wood.

In setting out the tithe of wood, which is *de jure* a great tithe ⁽³⁾, it is sufficient if there be no custom or usage to collect it into loose heaps or boughs: but if there be any usage in the parish, it must be particularly attended to; and if it has been customary to bind it up before setting it out ⁽⁴⁾, or to count the tenth faggot or billet ⁽⁵⁾, such custom must be observed.

⁽¹⁾ Hard. 380. Gwm. 515. | Gwm. 1573. 2 Bulstr. R.

⁽²⁾ Gybbs v. Wybourn, | 27.
 Cro. Car. 526. | ⁽⁴⁾ Gee v. Perch, Gwm.

⁽³⁾ Reynolds v. Greene, | 581.
 | ⁽⁵⁾ Degge, c. 4. 246.

CHAP. V.

Of what Things a mixed Tithe is due.

SECTION I.

Of the Tithe of the Young of Beasts.

THE tithes of calves, colts, lambs, and pigs, are small mixed tithes, payable as soon as the animals are weaned, and capable of living on that food by which the mother exists. ⁽¹⁾

Of calves, colts, lambs, and pigs, when tithable;

But though neither the owner can compel the tithe-owner to accept, nor the tithe-owner oblige the occupier to set out these tithes, until they are able to subsist without their dams. Yet the *right* to the tithe vests at the time when the animal is dropped. Hence, in a very late case, where there was a composition between the tithe-owner and the occupier, ending at Lady-day, the Court of Common Pleas held, that all calves and lambs dropped before Lady-day, though not fit to be weaned until after that time, were covered by the composition, for the

When the right to these tithes accrues.

(¹) Newman v. Morgan, *in* | olds v. Vincent, Bunb. 133.
notis in Campbell's N. P. R. | Jenkinson v. Royston, 1 Dan.
 308. Croft v. Blake, Gwm. | R. 128. 5 Pr. R. 510. Com.
 530. Degge, c. 6. 256. Reign- | Dig. tit. *Dismes*. H. 6.

right to their tithe vests when they are dropped, as the right to the tithe of corn attaches when it is severed from the land, though that tithe is not to be set out until a later period. (1)

If only one,
the tenth of
its value due.

Of common right, a single animal of this description is tithable, and the tenth part of its value, when taken from the mother to be sold, kept, or killed, is then due to the tithe-owner. (2) So *ubi sunt sex vel septem*, or where there are more than ten, the number exceeding ten must be accounted for according to their value, and not carried over to the next year. (3)

When tith-
able by cus-
tom.

In tithing these animals, custom has great weight. Hence, though it has been determined that lambs are unfit to live without their dams on the first of May, and that the first of August is the proper time to set forth their tithe (4); yet a custom of tithing such lambs as are able to subsist without the ewes on St. Mark's day (the twenty-fifth of April,) and such as are unable to subsist without the ewes on that day, when they are capable of living alone, has been held good (5), though a custom to set forth tithe

(1) Welch v. Uppill, Brod. & Bing. R. 84. 2 Moore's Rep. 334. Boys v. Ellis, Gwm. 647. Bunb. 139.

(2) Kenyon v. West, Gwm. 541. 1 Wood's Dec. 313.

(3) Egerton v. Still, Bunb. 198. 2 Wood's Dec. 251.

(4) Heaton v. Regal, Gwm. 630.

(5) Lister v. Foy, Gwm. 579.

lambs on St. Mark's day generally is void, as being unreasonable, and bad upon the face of it. (1) So a custom, that calves in kind are to be delivered at the will of the owner after they are three weeks old, and at such time of the year as the owner thinks best to spare them, not hindering his breed, and if the parson delay the fetching, to pay the keeping is bad; for, though the general law which fixes the render of the animal to the time it can live without its mother, may be varied by the custom of different places; yet this custom, where the delivery of the calf is entirely determinable at the will of the owner, is perfectly unreasonable. (2) In like manner, a custom that tithe lambs should be delivered the first day of May, and that if any person have under seven lambs, he is to pay for every lamb a half-penny; and if seven lambs and under ten, one lamb, and to be allowed for every lamb short of ten a half-penny, and so likewise for any odd number, is invalid. (3)

The tithe of these animals is to be paid to To whom the tithe-owner of that parish where the young payable. are engendered, brought forth, and nourished (4);

(1) Croft's case, Gwm. 630.

(2) Jenkinson v. Royston,

1 Daniells, Rep. 128.

(3) Jenkinson v. Royston,

1 Dan. R. 129.

(4) Poph. 197.

When produced in a parish where the mother has not usually fed.

but if they are not produced in the parish where the mother has been usually kept and fed, the tithe-owner of the parish in which they are produced has perhaps the right of tithe. ⁽¹⁾

SECTION II.

Of the Tithe of Eggs, and Young of Fowls.

Tithe of hens, geese, ducks, pigeons, and eggs.

FOWLS, such as hens, geese, ducks, and pigeons, are either tithable in eggs or in the young, according to custom, but not in both. ⁽²⁾ It was formerly supposed that turkeys, being *feræ naturæ*, were neither tithable by their eggs nor young. ⁽³⁾ It has however been held in a more modern case, that tithe is now due for them, being equally tame with other species of poultry. ⁽⁴⁾ It would indeed be strange if it was otherwise, as they are clearly more tame and domesticated than pigeons, for which tithe must be paid, unless, as it has been said, when reared in a dovecot, and used for the family. ⁽⁵⁾

⁽¹⁾ Wright v. Elderton, Gwm. 607.

⁽²⁾ Degge, c. 11. 264. 1 Roll. Abr. 635. 642. Huit v. Hill, 3 Keb. 705. Gibs. Cod. 607.

⁽³⁾ Hugton v. Prince, Moore, 599.

⁽⁴⁾ Carleton v. Brightwell, 2 P. Wms. 463.

⁽⁵⁾ Thompson v. Holt, Gwm. 671. Jones v. Castilles, 2 Roll. Rep. 2. Anon. Lit. R. 40. Gwm. 428. Vide Brinklow v. Edwards, Gwm. 711. Bunb. 307.

SECTION III.

Of the Tithe of Milk and Cheese.

THE tithes of milk and cheese are small mixed tithes ; the former due, unless there is a custom to the contrary, when tithe is not paid of cheese ; the latter, when tithe is not paid of milk. ⁽¹⁾ Tithe of milk and cheese.

It is alike payable, whether the animal is fed on pastures in the parish, or in stalls on oil cakes, hay, vetches, or other produce that has before paid tithes in kind. Milk is *per se* tithable, and not due by way of commutation for the food eaten by the cow. ⁽²⁾

Where there is no particular usage or custom, the occupier is obliged to pay *de jure* the whole meal of every tenth morning, and his whole meal every tenth evening, and not the tenth part of the produce of all the cows each morning and each evening, as they come in to be milked ; to milk the cows at the usual place of milking, into his own pails, and the tithe-owner must Of milk, how payable.

⁽¹⁾ Austyn v. Lucas, Cro. | Cor. Richards. C. B. In
El. 609. Degge, c. 6. 258. | Gray's Inn, sit. aft. Trin. term,
Wats. Cl. L. 555. | 1821. MSS. C.

⁽²⁾ Wordsworth v. Bates,

carry it away from the milking-place in his pails in a reasonable time. If he does not fetch it before the next milking-time, the occupier is justified in pouring the milk upon the ground, because he then has occasion for his pails. As the produce of the evening's milk is always less in quantity than the morning's, they are considered as distinct tithable matters, from each of which the tenth is counted. The parting with two successive meals in one day may be a great inconvenience. But this may not often happen, and can never be the case where the cows are first milked in the evening. ⁽¹⁾

Where there
is a custom
in the parish.

But if there is any custom in a parish respecting the manner of tithing milk, such as carrying it to the church porch, parsonage house, or elsewhere, it must be observed by the parishioners ⁽²⁾; and this being the established course of tithing milk, where a custom to the contrary is alleged, it must be formally pleaded, and supported by such evidence as will be sufficient to warrant a court of equity in directing an issue to try the validity of the custom. ⁽³⁾

⁽¹⁾ Cullimore v. Bosworth, 7 Bro. P. C. 57. 2d edit. by Tomlins. Bosworth v. Limbrick, Gwm. 1101. 4 Wood's Dec. 24.

⁽²⁾ Dodson v. Oliver, Bunb.

73. Hutchins v. Full, 4 Wood's Dec. 155. Carthew v. Edwards, Amb. 72. Morgan v. Neville, Gwm. 1046.

⁽³⁾ Full v. Hutchins, 7 Bro. P. C. 78.

If cows are fed in one parish and milked in another, the milk must be paid to the tithe-owner of that parish wherein they are fed ⁽¹⁾, *ubi cubant et pascuntur* ⁽²⁾; whether the tithe-owner of the parish wherein they are milked can also claim any thing, may hereafter be a question for the decision of a court.

Cows fed in one parish and milked in another.

SECTION IV.

Of the Tithe of Wool.

THE tithe of wool of sheep and lambs is a small mixed tithe, due of common right when it is clipped, though by prescription it may be set out at some other time. ⁽³⁾

Tithe of wool, a small mixed tithe, payable when clipped.

This tithe must be paid for the wool of sheep killed and eat in the house, as well as for those that are sold; nor will the plea that a certain number have died of the rot ⁽⁴⁾; nor that locks are shorn from the neck, in order to preserve the sheep from flies and other vermin, exempt the occupier ⁽⁵⁾; but where the wool is shorn

For what due.

⁽¹⁾ Wright v. Elderton, 54. ——— v. Gold. Amb. 149.
1 Wood's Dec. 519. Gwm.

607. ⁽⁴⁾ 1 Roll. Abr. 646. Degge, c. 6. 257.

⁽²⁾ Lind. de Dec. Ebb. 3. tit. 16. c. 199. ⁽⁵⁾ 3 Com. Dig. tit. *Dismes*,

⁽³⁾ Green v. Hum. Cro. El. H. 7.
702. 3 Cruise D. tit. 22 sect.

from the neck about Michaelmas, to prevent the sheep being caught in the briars, it is said not to be tithable. ⁽¹⁾

Sheep removed from one parish to another between shearing times.

By a canon cited in Lindwood, it is said, that if sheep are removed from one parish to another between the times of shearing, the tithe-owner of each parish must have tithe *pro rata*; but that, if they are less than thirty days in any parish, no rate is then due to the tithe-owner, in consequence of the short time of their pasture. Modern decisions, however, though not exactly on this point, would not, it is presumed, arrive at this conclusion; and it seems most probable that the tithe of wool, for a much less period than thirty days, might now be successfully demanded in the parish where the sheep are shorn. Thus, where lambs were brought into a parish in the month of August, and shorn four days after they were so brought in, their wool was held tithable in that parish ⁽²⁾: and the wool of lambs is tithable, though the lambs have been tithed two months before. ⁽³⁾

How payable.

In some places the tithe of wool is paid by the fleece ⁽⁴⁾; in others by the pound: the latter mode is least liable to fraud and inconvenience, and therefore preferable.

⁽¹⁾ 1 Roll. Abr. 645. l. 45.
50.

⁽²⁾ Beaumont v. Shilcot,
3 Wood's D. 172.

⁽³⁾ Baker v. Sweet, Bumb.
90.

⁽⁴⁾ Wilson v. Wilkinson,
2 Stra. R. 783.

CHAP. VI.

Of what Things a Personal Tithe is due.

PERSONAL tithes arise from the personal industry of man, and are only payable out of his clear gains, after charges deducted, according to his estate or degree. ⁽¹⁾

Definition of personal tithes.

By the statute 2 & 3 Edward VI. chap. 13. it is enacted, that every person who had, within forty years preceding, paid personal tithes, should pay the tenth part of his clear gains, after deducting all charges and expenses.

In claiming personal tithes, it will therefore be necessary to show that they were constantly paid or payable for forty years before the statute, which may be done by proving that they have ever since been paid, during the time of memory. ⁽²⁾

The proofs necessary in claiming them.

Common day-labourers ⁽³⁾, and servants occupied in husbandry ⁽⁴⁾, by whose labour the tithe-owner's other tithes are increased, are exempted

Labourers and servants exempt.

⁽¹⁾ 2 Inst. 621. 1 Roll. Abr. 656.

⁽³⁾ 1 Roll. Abr. 646.

⁽⁴⁾ Ibid.

⁽²⁾ Degge, c. 22. 341.

custom to the tithe owner of that parish wherein they are landed and sold, and payable in kind.⁽¹⁾ Less than the tenth part may be due⁽²⁾; a payment of the eleventh, twelfth, and twentieth fish, has been adjudged to be a good custom.⁽³⁾ Hence the tithe of fish, whether taken in the sea, in an enclosed or open river, in a wear or fishery, has been often decided to be due by custom, and payable in kind⁽⁴⁾; but without such custom, it has been resolved that fish caught in a pond and sold, are not tithable.⁽⁵⁾ In Wales, Yarmouth, Cornwall, and elsewhere, all kinds of fish caught in the sea and other places are frequently tithable⁽⁶⁾; and in Ireland it is a very common custom to pay the tithe of salmon taken in rivers in kind.⁽⁷⁾

(¹) *Wills v. Harris*, 3 Wood's D. 385. *Swatman v. Bonner*, 2 Wood's D. 35. *Borlase v. Batten*, 3 Wood's Dec. 499.

(²) *Sheppard v. Penrose*, 1 Lev. 179.

(³) *Kemster v. Stuart*, 1 Wood's D. 53. *Robinson v. Foulk*, 1 Wood's D. 240. *Audley v. Fiddy*, 1 Wood's D. 5.

(⁴) *Anon. Hetley*, 19. 1 Roll. Abr. 656. *Dawes v. Huddleston*, Cro. Car. 339. *Holland v. Heale*, Noy, 108. *Anon.*

Cro. Car. 264. *Earl of Sandwich v. Hunter*, Bunb. 43. *Audley v. Fiddy*, 1 Wood's D. 7. *Williams v. Burt*, Gwm. 931. 3 Wood's D. 100. *Austen v. Nicholas*, Gwm. 616. in notis.

(⁵) *Nicholas v. Elliott*, Gwm. 1581.

(⁶) *Gossain v. Harden*, 1 Roll. R. 419. *Apon. Cro. Car. 264.* *Gwavas v. Keynack*, Gwm. 691. *Stamford v. Lake*, 1 Wood's D. 526.

(⁷) *Anon. Cro. Car. 339.*

SECTION II.

Of the Tithe of Mills.

THERE has been great difference of opinion from time to time among the judges, whether the tithe of a mill is a predial or a personal tithe. In one case the Barons of the Exchequer held it to be a predial tithe ; but on an appeal to the House of Lords, with the assistance of eight judges, the decree was reversed, and the tithes of the mill recovered in the nature of a personal tithe. (1) The principle in the case alluded to, as well as in others subsequently decided, seems now fixed ; namely, that the tithe of a mill, as far as regards its locality, and the person to whom it is payable, is to be considered as a predial tithe ; but in the *mode* of payment is to be treated as a personal small tithe, and recoverable in the nature of a personal tithe. (2)

Tithe of mills, how far a predial and personal tithe.

Ancient mills, or mills built before the time of memory, of which no tithe has been paid, are not tithable. Most ancient mills were erected

Ancient mills not tithable.

(1) Chamberlaine v. Newte, 1 Eq. Ca. Abr. 366. Gwm. 596. Dodson v. Oliver, Bunb. 78. Carleton v. Brightwell, 2 P. Wms. 463.

(2) Talbot v. May, 3 Atk. 18. Gaches v. Haynes, 4 Wood's D. 588. Hall v. Machet, 3 Anstr. 915.

by lords of manors, and suit and service established as a recompense. They received a toll in specie, called *multura*; and being for the common good, the mills were in other respects exempted from tithes. Afterwards, when other mills were erected, and corn was ground for money, the clergy claimed tithes, and the millen claimed an exemption, as had been used for ancient mills. The law now is, that for ancient mills, of which no tithes have been paid, none shall be paid: whereas for other mills, erected within time of memory, the tithe is due⁽¹⁾; and by the statute 9 Edw. II. c. 5. no prohibition is allowed for tithes of new mills built after that statute.

Of ancient
mills rebuilt.

If such ancient mills fall, and are rebuilt upon the old foundations, the discharge will in like manner hold good and revive.⁽²⁾ The mill itself, being the substance of the thing exempted, will not lose its privilege by being occasionally used in another capacity. Hence an ancient water mill does not lose the privilege of being exempt from tithes by being occasionally used as a lead mill⁽³⁾; and a mill formerly a tacking mill, afterwards used for the purpose of grinding oats for the owner's hounds, and for no other purpose whatever, is not subject to tithes.⁽⁴⁾

When occasionally used for other purposes than grinding corn.

⁽¹⁾ 2 Inst. 621. Wilson v. Mason, Gwm. 974. 3 Wood's Dec. 285.

⁽²⁾ Gwm. 130. in notis.

⁽³⁾ Gwm. 974.

⁽⁴⁾ Hicks v. Triese, Gwm 1022. 3 Wood's D. 963.

So, on the other hand, when the exemption from tithe is suspended, and the mill converted into a corn mill, the right to tithe revives. ⁽¹⁾

Where mills are used in any art or manufactory, no tithe is payable for them; for besides that it would be a great discouragement to trade, in many instances tithes would be paid for different parts of the same manufactory; and as it is uncertain what the profit of any particular branch of a manufactory is, as mere engines of trade, it would be impossible to estimate them. Thus lead mills, paper mills, snuff mills, iron mills, tin mills, plate mills, rag mills, mills for distillation, and others of that nature, invented for the ease of man's labour, are not tithable, unless some particular and strong custom is shown to the contrary, in which case the usage of the country must be respected. ⁽²⁾

When used in a manufactory.

Hence it appears that those mills alone are tithable which grind meal for food and for hire, being new mills, or having within the time of memory paid tithes. ⁽³⁾ It will, moreover, be incumbent on the tithe-owner to show that the mill has been accustomed to pay tithe, as the

What mills alone tithable.

Of the mill having been accustomed to pay tithe.

⁽¹⁾ Brown's case, Godb. R. 194. Hooper v. Andrews, 1 Ro. R. 121. Manby v. Taylor, 3 Ves. & Bea. 71.

Cro. Jac. 523. Gwm. 977. 2 Roll. Rep. 84. Lit. R. 314.

⁽³⁾ Thomas v. Price, Gwm.

⁽²⁾ Dandridge v. Johnson, 871.

court will otherwise presume it to be an ancient mill. ⁽¹⁾

To whom,
and when
due.

The tithes of mills being personal tithes in every respect, except as to the person to whom they are payable, are in all other points subject to the rules respecting personal tithes—due to the tithe-owner of that parish wherein the mill is situated—payable once in the year by the statute Edw. VI. at or before the feast of Easter, out of the clear profits, after deducting all the expenses incident to and on the mill.

Of the de-
duction of
expenses.

Thus, when a mill is in the hands of a tenant, the tenant's clear gain is what remains to him after payment of rent, servant's wages, repairs, and other expenses; the tenth part of which gain is due to the tithe-owner. So when in the possession of the owner, an annual value or rent must be set upon the mill, and when that is ascertained, it should be deducted (as rent actually paid,) since the expense of building the mill would otherwise not enter into the calculation. The tenth of the profit is then due to the tithe-owner of that parish wherein the mill is situated, being, as was before observed, a predial tithe, in respect of the person to whom it is due. ⁽²⁾

⁽¹⁾ Hughes v. Billingham, Gwm. 644.

⁽²⁾ Hall v. Machet, 3 Anstr. 915.

The tithe-owner is not entitled to call on the miller to state the price at which he has sold the meal ground at his mill, but in an answer to a bill for the discovery of tithes, the miller must state the *quantity* of meal that has been ground by him. (1)

Miller need not state the price, but the quantity sold.

SECTION III.

Of Easter Offerings.

CONNECTED with the subject of personal tithes is that of Easter offerings, which are said, by Baron Gilbert, to be a compensation for personal tithes. They are due to the parson who exercises the spiritual functions of the church in the parish wherein each person dwells (2), at the rate of two-pence per head, unless it is customary to pay more. (3) A custom, that every householder, being a married man, shall pay in lieu of all other things whatsoever four-pence in the name of an offering; and that every son and daughter, or other servant not having wages, shall pay a halfpenny; and every servant

Easter offerings — to whom due — at how much per head.

(1) Chapman v. Pilcher, Wight R. 15.

(2) 2 and 3 Ed. 6. c. 13. Ayl. Par. Jur. Can. Ang. 395.

(3) Egerton v. Still, Bunb. 198. Lawrence v. Jones, Bunb. 173. Vernon v. Sloane, Gwm. 889.

having wages, two-pence, if they receive the sacrament, has been held good. (1)

How recoverable.

Easter offerings, as well as all other obventions and customary payments for communicants, marriages, christenings, churching of women, and burials, are payable to the parson of that parish wherein the parties dwell (2); recoverable, when the custom is not denied, in the spiritual court; when it is, in a court of common law. (3)

Other church profits.

The profits of some churches consist partly in pensions, annuities, corrodies, indemnities, synodies, and proxies due and payable from other churches or persons. (4) There are also several other charities, which were formerly converted into obligations, and enforced by the canons of the church. Amongst them may be named the kirk or church shot, which was a house-tax, payable at the feast of Saint Martin, for that hearth where a person resided the preceding Christmas. (5) The plough alms was a penny for every plough land in the

Of the kirk shot.

Plough alms.

(1) *Swaine v. Pern*, 1 Wood's Dec. 341.

(2) *Burdeaux v. Lancaster*, 1 Salk. 332. *Dean and Chapter of Exeter's case*, 1 Salk. 334. 7 & 8 Will. 3. c. 6. *Degge*, c. 23. 345. *Wats.* Cl. L. 571.

(3) *Fruin v. Dean and Chap-*

ter of York, 2 Keb. 778. *Andrews v. Symson*, 3 Keb. 523. Do. 3 Keb. 527.

(4) 34 and 35 Hen. 8. c. 19. *Wats.* Cl. L. 572.

(5) *Leges Canuti*, in *Wilkins's Ang. Sax. Leg.* 130. *Leges Inæ Regis*, l. by *Whetloc*.

parish, and paid within fifteen days after Easter. ⁽¹⁾ The leot-shot or light shot, was payable Leot shot. thrice in the year, upon Easter Eve, at All Saints, and at Candlemas; being a certain quantity of wax, of about the value of one penny, for each hide of land. ⁽²⁾ The aggregate amount of all these perquisites composed in each parish a fund, which was devoted to nearly the same purposes as the revenues of the cathedral churches. ⁽³⁾

⁽¹⁾ Liber Constitutionum Temp. Æthelredi R. in Wilkins's Leg. Ang. Sax. 114. Hist. of Manchester by Whitaker, lib. 2. c. 11. 433.

⁽²⁾ Leges Canuti Regis, by

Wheloc, 8. 12. Leges Can. in Wilkins's Leg. Ang. Sax. 130.

⁽³⁾ Antiq. of the Ang. Sax. Ch. by Lingard, 90.

[illegible]

1. *Chlorophyll a* (Chl *a*)
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 27. *Chlorophyll aa* (Chl *aa*)
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 31. *Chlorophyll ae* (Chl *ae*)
 32. *Chlorophyll af* (Chl *af*)
 33. *Chlorophyll ag* (Chl *ag*)
 34. *Chlorophyll ah* (Chl *ah*)
 35. *Chlorophyll ai* (Chl *ai*)
 36. *Chlorophyll aj* (Chl *aj*)
 37. *Chlorophyll ak* (Chl *ak*)
 38. *Chlorophyll al* (Chl *al*)
 39. *Chlorophyll am* (Chl *am*)
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 41. *Chlorophyll ao* (Chl *ao*)
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 53. *Chlorophyll aza* (Chl *aza*)
 54. *Chlorophyll abz* (Chl *abz*)
 55. *Chlorophyll acz* (Chl *acz*)
 56. *Chlorophyll adz* (Chl *adz*)
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 95. *Chlorophyll aqz* (Chl *aqz*)
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 104. *Chlorophyll azz* (Chl *azz*)
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 128. *Chlorophyll axz* (Chl *axz*)
 129. *Chlorophyll ayz* (Chl *ayz*)
 130. *Chlorophyll azz* (Chl *azz*)
 131. *Chlorophyll azaa* (Chl *aza*)
 132. *Chlorophyll abz* (Chl *abz*)
 133.

identical to the one used in the previous study. The only difference was that the stimulus was presented for 100 ms, and the response was required to be made within 100 ms. The response was recorded by a computer that was connected to the subject's hand via a response box. The response box was connected to the computer via a parallel port. The response box was connected to the computer via a parallel port. The response box was connected to the computer via a parallel port.

11.

A
PRACTICAL TREATISE
ON THE
Law of Tithes.

PART THE SECOND.

CHAP. I.

Of Things not in general tithable.

SECTION I.

On the Tithe of Afterpasture.

AFTERPASTURE is the pasture that is eaten on land after it has been mown in that year. Definition of afterpasture.

It appears, from numerous authorities upon this subject, that no tithe is *de jure* due for afterpasture, or feeding animals on land that has paid tithe of hay the same year. (1) Not tithable.

<p>(1) Grene v. Austen, Gwm. 226. Franklyn v. Master, &c. of St. Cross, Gwm. 629. Chapman v. Keep, Gwm. 779. Richardson v. Cabell, Poph. 142. Johnson v. Parker, 2 Roll. R. 191. Ayde v.</p>	<p>Flower, Bunb. 7. Ellis v. Saule, per Eyre, C. B. 1 Anst. 340. 2 Inst. 652. 1 Roll. Abr. 641. Hall v. Babb, 1 Wood's D. 220. Batchelor v. Smallcombe, 3 Maddox R. 20.</p>
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Stubble.

The like rule is applicable to arable land ; the tithe of corn having been paid, it is not again due for the afterpasture or stubble which grows upon it, and is eaten therefrom in the same year. ⁽¹⁾ Dr. Burn had supposed that these authorities were wrong, and that the modern determinations in equity were contrary : for that the stubble and after-eatage, are as much a part of the increase of that same year as the corn or hay. ⁽²⁾ In a late case, however, Macdonald, C. B., noticing this passage, stated, that a doubt was suggested in Burn, on the general principle, that tithes are due of every increase of the land, and that the modern practice of the court of equity was contrary to the old authorities. But this seems to be a mistake, no case to that effect having been mentioned in the books, nor existing in the memory of any person. ⁽³⁾

It may perhaps be difficult to assign a reason for the distinction in this respect which undoubtedly prevails between aftermath and afterpasture, the one being tithable, the other not so. But this may probably be the cause. In the former case, where each increase is cut, the soil

⁽¹⁾ 2 Inst. 652. *Andrews v. Lane*, Gwm. 477. *Johnson v. Awbrey*, Cro. El. 660. *Chapman v. Keep*, 2 Wood's D. 424.

⁽²⁾ 3 Burn's Eccl. L. 482.

⁽³⁾ *Tennant v. Stubbing*, 3 Anst. R. 640. Gwm. 1438.

may be said to be thereby again deteriorated, and the tithe-owner less likely to have the full benefit of the following year's produce. In the latter, there is no deterioration, but the land is benefited by the feeding, and the succeeding crop thereby rendered more sweet and profitable.

SECTION II.

Of the Tithe of Animals Feræ Naturæ.

ANIMALS feræ naturæ. No tithe is due for Animals feræ naturæ, not tithable; birds or beasts that are in their nature wild, unless by custom, which custom it will be incumbent on the tithe-owner to establish. Hence hounds, ferrets, hawks ⁽¹⁾, pheasants ⁽²⁾, partridges, though tame and kept in a place enclosed, where they lay their eggs and hatch their young ones ⁽³⁾; wild fowl, such as ducks, mallards, and teal, though taken in a decoy, and thereby of great profit to the owner ⁽⁴⁾; deer ⁽⁵⁾, bees ⁽⁶⁾, which however pay tithe of honey and wax ⁽⁷⁾, and conies, though in en-

⁽¹⁾ Degge, c. 8. 260.

⁽²⁾ March. R. 26.

⁽³⁾ Hugton v. Prince, Moore. R. 599.

⁽⁴⁾ Camell v. Ward, Gwiaz. 531. 1 Wood's D. 209.

⁽⁵⁾ 2 Inst. 651.

⁽⁶⁾ Barfoot v. Norton, Cro. Car. 559.

⁽⁷⁾ Anon. Cro. Car. 404.

but may be
due by cus-
tom.

closed warrens⁽¹⁾, are not tithable by the com-
mon law, and tithe of them is due only by
custom.

SECTION III.

Of the Tithe of Barren and Waste Lands.

Stat.
2 & 3 Ed. VI.
The tithe of
barren heath
or waste
ground.

By the statute 2 & 3 Edward VI. c. 13. § 5.
all such barren heath or waste ground, other
than such as be discharged from the payment of
tithes by act of parliament, which before this
time have lain barren and paid no tithes by reason
of the same barrenness, and now be or hereafter
shall be improved and converted into arable
ground or meadow, shall from henceforth, after
the end and term of seven years next after such
improvement fully ended and determined, pay
tithe for the corn and hay growing upon the
same.

(Sect. 6.) Provided, that if any such barren
waste or heath ground hath before this time
been charged with the payment of any tithes,
and that the same be hereafter improved or

(¹) *Nicholas v. Elliot*, Gwm. 1681. *Flower v. Vaughan*,
Het. R. 147. Lit. R. 311. *Walton v. Tryon*, Gwm. 840. | *Anon. Cro. Car.* 339. *Anon.*
1 Vent. R. 5 *Randal v. Head*,
Hard. R. 188. *Towerson v.*
Winget, 1 Keb. 602.

converted into arable ground or meadow, that the owner or owners thereof shall, during seven years next following from and after the same improvement, pay such kind of tithe as was paid for the same before the same improvement.

It has been frequently held, that such land only is barren within the meaning of this statute, as produces nothing profitable *quoad agriculturam*, in consequence of its *natural* barrenness; and that ground which has been stubbed and grubbed, and afterwards bears corn or grass, is not barren. (1) Hence, land that is in its nature apt for tillage, that is, capable of producing a crop of corn, must immediately pay tithe, though a great expense may have been incurred in inclosing and draining it (2); as if it has been gained from the sea (3), or having been fenmy (4), is drained and cultivated, if the soil is naturally good, and not infertile, it must immediately pay tithe.

Effect of stat.
2 & 3 Ed. VI.

The act does not consider the labour that may be used in meliorating or cultivating it.

What land
naturally
barren,

(1) Wats. C. L. 536. Gibs. Cod. 698. Tanner v. Kirkham, Gwm. 131. in notis. Ld. Raym. R. 991.

(2) 2 Inst. 656. Jones v. Le David, Gwm. 1336. Witt

v. Buck, 3 Bulst. 165. 1 Ro. R. 354.

(3) Anon. Moore R. 430. Anon. Gwm. 166.

(4) Sherington v. Fleetwood, Cro. El. 475. 2 Inst. 656.

The distinction seems to refer to its *natural* capability to produce a first crop, and whether an additional labour and expense is necessary for the production of the first crop, that is, *whether an extra dunging, liming, and manuring is required to assist its natural and original barrenness.*⁽¹⁾ Yet, in one case, the exemption from tithe seems to have hinged on somewhat more than the natural barrenness of the soil. Howburn bog, in Durham, was so boggy, hollow, and wet, that no cattle could go on it without great danger of being lost; and when it was drained, ploughed, and sown, it could not be harrowed by either horses or cattle, but by men only; the crops turned out mean and bad: but Eyre, Baron, sitting for the Chancellor, did not seem to put the question on that point, but asked what land could be barren if that was not so, where no cattle can tread, no plough can go; and the bill for tithes was dismissed with costs.⁽²⁾

Land where
wood has
grown not
barren.

Again, land whereon wood has grown, being grubbed up and converted into tillage, is not to be considered as barren land, and as such exempt from the payment of tithe.⁽³⁾ Where an

⁽¹⁾ *Stockwell v. Terry*, 1 Ves. 116. *Doyley v. Hornby*, Gwm. 714. *Kingsnail v. Billingsley*, 3 Pr. R. 465.

⁽²⁾ *Byron v. Lamb*, Gwm. 1594.

⁽³⁾ *Beardmore v. Gilbert*, Bunb. 159. 2 Inst. 656. Bul. N. P. 190.

occupier purchased forty acres of poor land overrun with furze, broom, and briers, though a loser every year in improving and cultivating it, the crops being very small and poor in consequence of the little natural fertility of the soil; yet he was obliged to pay tithe, and was not allowed the benefit of the statute, of being exempt for seven years⁽¹⁾: for such lands were not *suapte natura* barren, but merely become so in consequence of the negligence or ill husbandry of the occupiers, and therefore at any time convertible into arable land, and tithable. So lands which were barren heath or waste ground at the time of making this act, having been improved and once had its benefit, cannot, in consequence of a second return to a state of barrenness, have the benefit of the act by a second improvement.⁽²⁾

As there have, however, been formerly considerable doubts thrown on this subject, it may be advisable to state, at some length, three recent decisions in the Courts of King's Bench, Common Pleas, and Exchequer, directly in point, which have now satisfactorily decided all questions of this nature.

Proper test whether land requires an extraordinary expense in manuring and dunging to bring it into a fit state of cultivation.

The contest in the King's Bench was, whe-

(1) *Dowley v. Hornby*, Gwm. 714. Anon. Ld. Raym. R. 991.

(2) *Degge*, c. 19. 322.

ther land was exempted for seven years under the proviso in 2 & 3 Edw. VI. c. 13. § 5, which was part of a forest, and had whins and brackens growing upon it, and a small portion of ling. Early in the summer of 1821 it was ploughed, and limed with about thirty-five Carlisle bushels (one hundred and five Winton) per acre, but this was said not to be more than was sometimes used in breaking up old meadow land into arable, and harrowed three times, and again in the following spring ploughed twice and harrowed six times. There was a middling crop the first year: and it was proved that in the then present year there was a much better crop from only one ploughing, and without any manure; and also, that it was land of good quality: and it was not denied that if the land had been broken up without liming or manuring, it would not have produced a crop with seed and labour. Lord Ellenborough observed, (the learned judge on the trial having directed the jury to find a verdict exempting such land from tithe, if it was not in its own nature so fertile as to produce of itself without tillage a crop which should yield a profit to the occupier beyond the expense of ploughing, sowing, and reaping,) the point for the decision of the Court is, whether the jury, in determining this case, have not had their attention directed to too strict and limited a rule of law as to the description of barren land within the meaning of the

statute.* The words of the statute must be considered, Lord Coke's comment upon it, and the decided cases. The words of the statute 4 & 5 Edw. VI. c. 13, § 5. are, "that all such barren heath or waste ground, other than such as be discharged from the payment of tithes by act of parliament, which before this time have lain barren, and paid no tithes by reason of the same barrenness, and now be or hereafter shall be improved and converted into arable ground or meadow, shall from henceforth, after the end and term of seven years after such improvement fully ended and determined, pay tithe for the corn and hay so growing upon the same." The sixth section shows that land, to be entitled to this exemption, need not be *quite unproductive*, because it enacts the payment, during the seven years, of such tithes as had been before paid. On the other hand, the statute does not exempt meadow land converted into arable, nor the converse, nor, as I conceive, pasture (unless it be barren, &c.) converted either into meadow or arable. To establish the exemption, the land must have been "barren heath or waste ground;" and this the party who claims the exemption must show. Further, all "barren heath or waste ground" is not exempted, but only "such as had paid no tithes by reason of its barrenness;" and this also the party claiming

* The cause was tried before Baron Wood, at the Summer assizes for Cumberland, 1813.

the exemption must show. The description of such "barren heath or waste land" may be illustrated by a description of its opposite, "fertile land;" but the question to which the attention of the jury is to be directed is, is it "such barren or waste ground as had paid no tithes by reason of its barrenness." To decide for the exemption, they must be satisfied that it is. All land upon which this question can arise must be land first (i. e. never before) cultivated for a crop of grain or hay. There is land which is neither fertile nor barren: such land is not entitled to exemption from its want of fertility, if it cannot be said to be barren. There is nothing in the words of the statute from whence it can be collected, that the legislature included all land within the exemption which would not produce a profitable crop, by those steps alone being taken, viz. turning up the soil and sowing it with corn. There are two causes of unproductiveness of land one arising from the mere neglect of cultivation, the other because the land is in its nature unfit for and indisposed to receive and return the benefits of cultivation. The latter only is protected; all land which has not been already cultivated by the plough is, to use Lord Coke's words, (2 Inst. 655.) so far *not apt for tillage*. Something must necessarily be done, some labour bestowed, some expense incurred, in all cases, to conquer this inaptitude. Then comes the question on the limitation in

the statute, whether "it has paid no tithes by reason of barrenness," (on which the comments made on the statute and the cases have principally turned;) in other words, "whether it be *suapte natura sterilis*;" and this, all agree, must be shown, to entitle it to an exemption. It seems neither reasonable, nor analogous to the common course of husbandry, to confine the *inaptitude for tillage* to such causes only as hinder the use and passage of the plough over it; such as the incumbrance of wood, of water, or furze and whin: there is an ulterior inaptitude to these, in all cases of new land, arising from the rankness and foulness of the soil, and, if I may use the expression, from its unsubdued condition. If the land only require the manure and cultivation ordinarily necessary to bring it into an apt state of tillage, it is not, *suapte natura sterilis*. Sterility *ex vi termini* imports an ungrateful soil; a sort of natural and constitutional infecundity, resisting the ordinary means properly applied to render it otherwise. If that *great charge* and industry, which Lord Coke speaks of in the same page of his book (1) should be required, if that *very great cost* for the *extraordinary manuring* of it, which the whole court, in *Buck v. Witt* (2), adverted to as the criterion of barren land, be necessary, then the land is *suapte natura sterilis* within the statute, and entitled to the exemption

(1) 2 Inst. 656.

(2) 3 Bulst. 166.

of it. The expression in that case is very remarkable; "the whole court agreed in this, that by the statute, barren ground is such ground as will not bear corn of itself, without very great cost in the extraordinary manuring of it." All the cases have expressions of some sort or other, from whence it appears, that though the very expression of *extraordinary* manure may not occur, the idea was in the contemplation of the court. In *Sherington v. Fleetwood* ⁽¹⁾, which was relied on by the defendant, Lord C. J. Bingham's words are, "and the statute does not intend that tithes shall not be paid within seven years after the manurance, &c. but of such land as was merely *barren*, and made good by *fodrage* or *other industrious means*. In *Stockwell v. Terry* ⁽²⁾, Lord Hardwicke is stated to refer to Lord Coke's rule in 2 Inst. 656. in these terms: "If land is in its own nature so barren as not to be fit for agriculture after it is improved, it shall not pay tithe; but if in its own nature it is fit for tillage, but by reason of wood or other accidental circumstances it was not turned into tillage before, upon the taking away that accidental circumstance, it shall pay tithes presently upon being turned into tillage; for the act does not consider the expense, but that you may by possibility be paid, as by the timber, underwood &c. But if afterwards this land will not produc

⁽¹⁾ Cro. El. 475.

⁽²⁾ 1 Ves. 115.

without being dunged or chalked, the court has considered this as *evidence* of its being barren in its own nature; not proper for corn without additional improvement. The question is, what is necessary for the first crop? If an additional expense is necessary to make it produce the first crop, seven years shall be allowed." For this position, that *if an additional expense, &c.* no prior dictum or decision in any law-book is to be found, much less for the point now contended for, "that if any additional expense is necessary to make it produce a first crop *yielding a profit*, seven years shall be allowed." Upon this authority, however, it is in the first place to be observed, that Lord Hardwicke only states this as evidence, that is, as a circumstance to prove its being barren, which is a very different thing from laying down a positive rule of law as resulting from the mere fact itself; and the note in Vesey gives no particulars of the evidence relating to the culture and produce of the crops on this land. Upon the whole, it appears that neither the words of the statute, nor the comment upon it, nor a view of the adjudged cases, will warrant such a rule of law as has been contended for in the present case. The proper inquiry seems to be, whether this land was of such a nature as to require *extraordinary expense, either in manure or labour, to bring it into a proper state of cultivation.* (1)

(1) Warwick and another v. Collins; 2 Maule & Sel. R. 349.

Indeed, land which is of a good natural quality must pay tithe immediately, although the expense attending the breaking it up and liming it exceeds the return made to the farmer in the several first-years of cultivation. (*)

In the case in the Common Pleas it was stated, that it appeared in evidence that the land in question had been parcel of a forest, and covered with timber and underwood, which was grubbed up. After grubbing the wood, part of the land had been chalked with chalk raised from the substratum of the same land; but the principal part of the *crops were* obtained without chalking, or any other manure, and without extraordinary labour or expense. The crops in some parts of the land were good, and they were sufficient to repay all the costs, and leave a profit to the farmer. Wood, Baron, left the case to the jury upon the principle laid down by the Court of King's Bench in the last case, and the jury found a verdict exempting it from tithe. Gibbs, C. J., delivering the judgment of the court, stated, that the proper inquiry in these cases is, whether the land was of such a nature as required extraordinary expense. My brother Wood left it to the jury whether it were of that description, and the jury found it was. One ground on which a new trial was moved for is, that the evidence

(*) Warwick and another v. Collins, 5 Maule & Sel. 166.

showed that the land was not of that description: we have looked carefully through the evidence, and we find there is no ground to say it was barren land (1).

In the Exchequer, the Court, after taking time to consider their judgment, directed an issue to try whether the lands, of which the tithes were demanded, were of such a nature as (exclusive of the labour and expense of clearing from furze or whins, and preparing the same for ploughing) necessarily to require extraordinary expense of liming and manuring, or labour, to bring them into a proper state of cultivation (2).

By the 17 Geo. II. c. 37. when waste lands, which were formerly fens and marshes, are drained and improved, and the parish to which they belong cannot be ascertained, tithes arising therefrom are due to the tithe-owner of that parish which lies nearest to such lands.

Fens and marshes in unknown parish.

(1) Lord Selkirk v. Powell, 6 Taunt. R. 297.

(2) Kingmill v. Billingsley, 3 Price, R. 465.

SECTION. IV.

Of the Tithe of Headlands and Forest Lands.

Headlands. HEADLANDS are that portion of a field which is left for turning the plough and horses. Formerly those lands, in all probability, were not ploughed, and the grass growing upon them was said not to be tithable. (¹)

Exempt only by custom.

It is presumed, however, that headlands thus cultivated are only exempt from tithe by custom, and not of common right. (²) Thus the court stated, upon one occasion (³), that the tithe-owner was by law entitled to the tithe hay of the grass growing on the headlands in the parish. But a custom for headlands sown with corn to be discharged of tithes, because fed on by plough cattle, or mown and cut for that purpose, or a discharge from the tithe of hay on the headlands, in consideration that the owner bound, reaped, and shocked the corn, when the mistaken notion prevailed, that the tenth ridge only was due, have been held good discharges against the payment of this tithe. (⁴)

(¹) Ralph Bradwell's case, Littlel. R. 18. 1 Roll. Abr. 646. Chapman v. Barlow, Bunb. R. 183.

(²) Haggard v. Hallows, 4 Wood's D. 121.

(³) Rice v. Manning, 2 Wood's D. 467.

(⁴) Gibs. Cod. 681: 2 Leon. R. 70.

Forest lands. — As lands not lying in any Forest land. parish pay tithes to the crown, so those within the precincts of a forest, though within a parish, if in the hands of the king, pay no tithes. But this privilege extends only to the king's lessee, and not his feoffee; and if the forest is disforested, and within a parish, it must then pay tithes. (*)

SECTION V.

Of the Tithe of Houses.

Of common right no tithe is due for houses or other buildings, nor for the profit made by the sale of them, nor for any rent reserved upon a demise of any house or building, because here there is no increase, no renewal, either at any stated or different periods. (*)

Houses not in general tithable.

Yet if it can be shown, that time out of mind some certain sum has been paid for houses, it will be inferred that the payment was originally in lieu of the tithe of the land on which the

How affected by custom.

(*) Seld. c. 11. § 4. Corbin's case, Het. R. 60. Wats. C. L. 506. Hertford v. Leach, Sir W. Jones R. 387. Gibs. Cod. 680. Burn's Ecc. L. 414.

(*) 2 Inst. 660. Leyfield v. Tysdale, Hob. R. 10. Clarke v. Prowse, Latch R. 210. Gibs. Cod. 682.

houses are built, and such customary payment or tithe must therefore be continued. ⁽¹⁾

The law for tithe of houses in London forms the subject of a subsequent chapter.

SECTION VI.

Of the Tithe of the Rakings of Corn.

Rakings of
corn not
tithable.

RAKINGS of corn that has been gathered into sheaves ⁽²⁾ are not due of common right; but it must be particularly understood, rakings involuntarily left are alone meant, or, as the old books express it, rakings left without covin, those which have been *minus voluntarie dispersæ*. ⁽³⁾ Hence, in a suit for these tithes in the ecclesiastical court, the suggestion for a prohibition must expressly set forth, that the rakings were involuntarily left, without fraud, as it is not sufficient to say, that they were *lapsæ, &c. et dissipatæ in collectione*. ⁽⁴⁾

⁽¹⁾ Wats. C. L. 486. Anon. Cro. Car. 596. Hob. 11.

⁽²⁾ Anon, 12 Mod. 236.

⁽³⁾ 1 Roll. Abr. 645. 2 Inst. 652. Wood's Inst. L. E. 170. Cicill v. Scott, Littlet. R. 31. Berd v. Adams, Moore 278.

Johnson v. Awbrey, Cro. El. 660.

⁽⁴⁾ Sherington v. Fleetwood, Cro. El. 475. Gibs. Cod. 684. Parrey v. Chauncey, Noy's B. 15.

SECTION VII.

On the Tithe of Things of the Substance of the Earth.

SUBSTANCE of the earth. — Things of the substance of the earth, or parcel of the freehold, and not of certain increase, are not tithable. Thus stone, gravel, and slate quarries; lead, coal, and tin mines; lime, clay, marl, chalk, and sand pits; as well as bricks, tiles, turf, iron, or lead-ore, are not *de jure* tithable, though by custom tithes are in some places payable for them.⁽¹⁾

Things of the substance of the earth not tithable.

(1) *Lyss v. Watts*, Cro. El. 277. *Moore R.* 908. 1 Roll's Abr. 637. *March R.* 58. *Anon.* 1 Mod. 35. *Tucker v. Gorgea*, 2 Keb. R. 177. *Anon. Het. R.* 14. *Amiers v. Chambers*, 2 Keb. R. 596. *Buxton v. Hutchinson*, 2 Vern. R. 46. 2 Inst. 651. *Doctor and Student*, 295.

CHAP. II.

*Of a general Discharge from the Payment of
Tithes of Monastery Lands.*

Effect of stat.
27 Hen. 8.
c. 28.

By the statute of the 27 Hen. VIII. c. 28, many of the monasteries which had not lands above the clear yearly value of two hundred pounds (from thence called the smaller monasteries) were dissolved and given to the king and his heirs. The statute, however, did not discharge the monasteries from tithes, and all the possessions which came by it to the king still remain charged at this day. (¹)

All houses of
200l. per ann.
not dissolved
by that stat.
but some by
31 Hen. 8.
c. 13.

It should however be observed, that by virtue of a proviso in the 27 Hen. VIII. (left out of the statute in the book of the Statutes at Large, but in the parliamentary records) some religious houses of or under two hundred *per annum* were saved from dissolution; and what were saved were not dissolved until 31 Hen. VIII., which exempted them from tithe. The clause in 27 Hen. VIII. is to this effect:

That the king, at any time after the making of this act, (27 Hen. VIII. c. 28.) may at his plea-

(¹) Gerrard v. Wright, Cro. Car. 423. Urry v. Boyer, Gwm. 250.
Jac. 607. Sidowne v. Holme,

sure ordain and declare, by his letters patent under his great seal, that such of the said religious houses which he shall not be disposed to have suppressed nor dissolved by this act, shall still continue, remain, and be in the same body corporate, and in the said essential state, quality, and condition, as well in possessions as otherwise, as they were before the making of this act; without any suppression or dissolution thereof, or of any part of the same, by authority of this act.

Hence several monasteries, of and under the yearly value of two hundred pounds, were not dissolved until the 31 Henry VIII., and are therefore within the branch of that act concerning the discharge of tithe. (1)

By the 31 Hen. VIII. c. 13. this dissolution was extended to all monasteries and religious houses, of whatever value the lands of which they were possessed might be (from thence called the greater monasteries), which were, in like manner, declared to be in the actual seisin and possession of the king; and such lands as were exempt from the payment of tithes before the dissolution, continued so, by the following clause (2): That the king, his heirs, successors, and assigns, which have, or hereafter

(1) Wood's Inst. L. E. 180.

(2) Sect. 21.

shall have, any monasteries, abbathies, priories, &c. or any manors, messuages, parsonages, appropriate tithes, pensions, portions, or other hereditaments, whatsoever they be, which belonged or appertained, or which now belong or appertain, unto the said monasteries, abbathies, priories, &c. or unto any of them, shall have, hold, retain, keep, and enjoy, as well the said parsonages, appropriate tithes, pensions, and portions of the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friars, and other religious and ecclesiastical houses and places, sites, circuits, precincts, manors, meases, lands, tenements, and other hereditaments, whatsoever they be, and every of them, according to their estates and titles, *discharged and acquitted of payment of tithes, as freely and in as large and ample manner as the said late abbots, priors, abbesses, prioresses, and other ecclesiastical governors and governesses or any of them, had, held, occupied, possessed, used, retained, or enjoyed the same, or any parcel thereof, at the days of their dissolution, suppression, renouncing, giving up, or coming to the king, &c.**

Lands in spiritual hands discharged by four ways at the time of dissolution.

Now, these spiritual bodies, at the time of their dissolution, were capable of holding the

* Vide the catalogue of monasteries discharged by this act at the end of this chapter.

lands discharged by four legal and ordinary ways.

First, by the pope's bull of exemption; secondly, by real compositions with the parson, patron, and ordinary; thirdly, by prescription; and fourthly, by order. (1)

The pope, usurping a power over the clergy in England, granted exemptions, at his pleasure, to religious bodies or persons, whereby they were freed from the payment of tithes; his grant being at that time allowed a good discharge against all rectors and vicars. (2)

Hence, although such exemption ceased by the dissolution of the body to whom it was granted, being personal, yet, if any religious person had an exemption at the time of the dissolution, the lands are now exempt, by the statute 31 Henry VIII. (3) An exemplification under the bishop's seal is good evidence of the pope's bull. (4) So, a pope's bull is evidence upon a special prescription to be discharged of tithe, where it is only said that the lands be-

Lands exempted by bull at the time of the dissolution are now exempt.

(1) Degge, c. 21. 328. Slade v. Drake, Hob. 295. Seld. c. 13. § 2. Gerrard v. Wright, Cro. Jac. 607.

(2) Cro. Jac. 607. Degge, c. 21. 328.

(3) 3 Com. Dig. tit. *Dismes*, E. 7. Slade v. Drake, Hob. 297.

(4) Olive v. Gwin. Hard. 118. Cope v. Bedford, Palm. R. 426.

longed to such a monastery, and were discharged at the time of the dissolution, for then they continue discharged by the act of parliament; but it is no evidence on a general prescription to be discharged, because that would show the commencement of such a custom, and a general prescription is, that there was no time or memory of things to the contrary. (1)*

Composition
real.

Secondly, compositions real were, when the abbot, prior, or incumbent of any church, together with his patron and ordinary, agreed, by deed or fine, that particular lands should be discharged of the payment of all manner of tithes; rendering for ever a certain portion of land, sum of money, or doing some other thing for the ease or advantage of the abbot or incumbent in lieu and satisfaction thereof. (2) These compositions were held to be a good discharge

(1) *Clanrickard v. Denton*, | (2) *Degge*, 20. 323. 21st.
Palm. 38. Bul. N.P. 247. | 490.

* The word *bull*, or bull, is, in a metaphorical sense, taken for a seal, or a diploma sealed by it: but among the ancients it was a golden badge, or ornament, which persons that triumphed over their enemies wore before them on their breast, hanging down like a medal: and it came to signify a deed, instrument, or writing described on parchment or vellum, with a piece of lead hanging thereunto by a string: and such writing or instrument is called a bull, from the lead annexed to it. Ayl. Par. Jur. Can. Ang. 181. Pol Virgil, lib. 8. 284.

from the payment of tithes⁽¹⁾; the agreement must have been made after the time of Richard the First's return from the holy wars, and before the thirteenth of Elizabeth⁽²⁾; and hence arose that kind of prescription, which will be hereafter mentioned, called *modus decimandi*. To constitute a real composition, there must have been the following requisites: — First, that the tithe was discharged; secondly, that a composition was given in lieu of such discharge; thirdly, that the composition was made with the consent of the patron, ordinary, and incumbent.

Thirdly; prescription, which can be only by a spiritual corporation⁽³⁾, is, where lands, always having been in spiritual hands, have never paid tithes. This usage must have been constant, without interruption, perpetual, time whereof there is no memory of man to the contrary; that is, from the time of Richard the First's return from the holy wars. At common law, a spiritual person could not claim his discharge by bull, composition, or order, without pleading it, with its ground and reason, specially; whereas the discharge by prescription was allowed without any other reason, because he was a person

(1) 2 Inst. 655.

(2) Bennett v. Neale, Wight.

Rep. 331.

(3) Gerrard v. Wright, Cro.

Jac. 607.

capable of such discharge⁽¹⁾; and evidence that the land of a spiritual farmer has never paid tithes, is sufficient to prove the prescription. ⁽²⁾ *

Order.

The fourth sort of discharge is by order.

Most orders
formerly
discharged.

In ancient times, abbots, priors, monks, and most religious orders, were exempt from the payment of tithes, as to those lands which they kept in their own occupation. ⁽³⁾ Pope Adrian IV. confined this exemption to the then three religious orders of Cistercians, Templars, and Hos-

⁽¹⁾ Slade v. Drake, Hob. R. 297.

⁽²⁾ Nash v. Molins, Cro. El. 206. Clavill v. Oram, Gwinn. 1355.

⁽³⁾ Seld. c. 6. § 5. 2 Inst. 651. Greg. Decret. lib. 3. tit. 30. c. 10. and 34.

* The difference between custom and prescription is, that the former is a local usage, not annexed to any particular person, and may be called private common law, or *lex loci*; whereas the latter is a personal usage, and confined to a certain person, house, or land. In claiming a custom, therefore, the plaintiff must allege, that within such a place there is, and from time whereof the memory of man is not to the contrary, there hath been, such a custom: in claiming a prescription he must aver that he, and all those whose estate he hath, or all his predecessors, have immemorially enjoyed it. Bennet v. Read, 1 Anst. 323. 1 Saund. R. 340. b. Tidd's Pr. 331. Degge, c. 13. 268.

pitalers. (1) * Pope Innocent III. extended the discharge to a fourth order; namely, the Pre-

(1) *Doubitofte v. Curteene*, | *Winchester's case*, 2 Rep.
Cro. Jac. 452. Bishop of | 43.

* The Cistercians were a branch of the Benedictines, so called from Cistercium, a forest in the bishopric of Chalons in Burgundy, where this order was instituted by Robert, abbot of Molisme, in that province. It was brought chiefly into repute by S. Harding, an Englishman, who has therefore been considered the principal founder. 1 Dug. Mon. Ang. 695. Pol. Virgil, lib. vii. 268. Tanner's Not. Mon. xv. 3 Reeves' Hist. Eng. Law. 222.

The Premonstratenses were canons who lived according to the rule of St. Austin, who set up this order at Premonstratum, in the diocese of Leon in Picardy: it was instituted in London by Northbergus, a priest. 2 Dug. Mon. Ang. 58. Tanner's Not. Mon. xviii. 1 Collier's Eccl. Hist. 337. Pol. Virgil, lib. vii. 263.

The Templars and the Hospitalers were the only two military religious orders in England, and their superior here was the first lay baron, and had a seat in parliament. They were instituted about the year eleven hundred and nineteen, enjoyed great privileges, were freed from tenths and fifteenths due to the king, were *cruc signati*; and a cross, as the ensign of their profession, used to be erected on their lands.

The Hospitalers were first called Knights of St. John of Jerusalem, because they built a hospital at Jerusalem wherein pilgrims were received; but being driven from the Holy Land, they settled at Rhodes: and afterwards having the island of Malta given them by the Emperor Charles the Fifth, were called Knights of Malta. They were formed for the defence of Christians and the Holy Land: *Ad defensionem Christianorum terre sanctæ adversus Paganos et Saracenos*. Tanner's Not. Mon. xxiv. 1 Newcourt's Rep. 666. Camden's Brit. fo. 340. 2 Reeve's Hist. Eng. L. 167. Magna

The three
discharged
orders.

monstratenses. (1) The exemptions of the three former continue legal, having been ratified in England; whereas the exemptions of the latter are invalid, not having received any such ratification. For, by the council of Lateran, which was a general law in England, lands belonging to either of the three first orders were discharged of tithes, when in their own manurance or improvement (2); but as all the books are silent, as to the allowance of this privilege in England to the order of the Premonstratenses, this bull of Pope Innocent III. will not avail persons who claim an exemption from tithes under a title of having obtained their lands from that order. (3) The general council of Lateran, however, exempted those lands alone from tithes, which were in the occupation and possession of the orders themselves before the time of that council (4); but no covenant or contract to pay

(1) 2 Inst. 651.

(2) *Doubitofte v. Curteene*,
Cro. Jac. 454. Wats. C. L. 532.
Stavely v. Ullithorn, Hard.

R. 101. 2 Inst. 651. *Sturthome's case*, Dyer, 277.

(3) *Townley v. Tomlinson*,
Gwm. 1004.

(4) *Lord v. Turk*, Bumb. 122.

Charta, cap. 37. Dug. Warwickshire, 706. Pol. Virgil, lib. vii. 269. 2 Dug. Mon. Ang. 497. 17 Ed. II. st. 3. Bracton, lib. i. c. 10. Their property was seized by Edward the Second, and the extent of their possessions was taken in a very accurate survey, now kept in the King's Remembrancer's Office.

tithe, made by any abbot or prior after the council, will annul the privilege of being tithe-free, this council having equal authority with an act of parliament, and concluding all parties. ⁽¹⁾

In process of time the Cistercians, having procured bulls to exempt not only those lands in their own manurance, but those occupied also by their tenants, a circumstance in no little degree tending to the injury of both rectors and vicars; the statute of the 2d Henry IV. c. 4. was enacted, whereby they and all other religious and secular persons were restrained from putting any bulls in execution for that purpose, or purchasing any such exemptions for the future, under the penalty of *præmunire*.

Conduct of
the Cister-
cians.

As this discharge was given to the three orders specified, only in respect to those lands *quas propriis manibus excoluerunt*, so it is now necessary for those proprietors who would have the advantage of this privilege, expressly to aver and show that the lands are in their own hands and manurance, for to say that they are seized of them is not sufficient, as they may be seized thereof, and yet others may occupy and have the manurance thereof ⁽²⁾. But in the king's

Of persons
claiming a
discharge
by order.

⁽¹⁾ *Stavely v. Ullithorn*, 101. ⁽²⁾ *Fox v. Bardwell*, 2 Com. R. 498. 2 Inst. 651.

Of the king
and his
tenants.

case, as he cannot cultivate the lands himself, with regard to him it has been determined, that his tenant for years or at will is discharged in like manner as the spiritual persons were. (1) Yet if, after having leased lands, he sells them or grants over the reversion, this privilege ceases, and they are liable to the payment of tithes. (2)

It has also been held, that a tenant in tail, who has an estate of inheritance in his own occupation, is discharged by virtue of the clause in this statute. An old case states that a tenant for life or years is not within the statute (3), which may be so, if a lessee for life or years holding under a common lease be thereby intended. In the case, however, of *Hett v. Meeds* (4), which was the case of a tenant for life holding under a settlement with remainder in tail to his daughter, the Lord Chief Baron admitted that a tenant in tail was entitled to the exemption, and added that he saw no reason why such tenant for life should be excluded from the benefit, any more than such tenant in tail. A fee simple may be divided into portions, into different estates for life, in tail, and remainder in fee, and the tenants of each portion should have the benefit as they succeed. Where

(1) Com. Dig. tit. *Dismes* E. 7. | (2) *Hardres*. 174.
(3) *Gib. Cod. Jur. Ecc.* 673. | (4) *Gwm.* 1515.

However, an abbot, having a privilege to be discharged from tithes *quamdiu manibus propriis*, in the time of Edward IV., made a gift in tail, it was determined that the donee of the issue should not be discharged, for the statute dischargeth none, but as the abbot was discharged at the time of the dissolution, (31 Hen. VIII.); so that they must claim the estate and discharge under the abbot since the statute: and so it holds, if by common recovery the reversion had been barred before or after the statute; but if the land had returned to the abbot or the king before or after the statute, the case is otherwise. (1)

By the statute 32 Hen. VIII. c. 24. the king shall enjoy the manors, parsonages, tithes, pensions, privileges, &c. of the prior and brethren of Saint John of Jerusalem. It has been frequently argued, that the lands of this dissolved priory not being within the body of the act of the 31 Hen. VIII. c. 18. cannot have the privilege of being discharged of tithes by it. (2) Other decisions however lead to a contrary conclusion; and this latter statute has been denominated *hifrons*, having relation to monasteries dissolved before the act, as well as those to be

Lands belonging to the priory of St. John of Jerusalem.

(1) *Farrer v. Sherman*, 250. The Serjeants' case, Hob. 248. Gwm. 281. *Cornwallis v.*

(2) *Urrey, v. Bowyer*, Gwm. Spurling, Cra. Jac. 57.

dissolved afterwards. ⁽¹⁾ Hence it seems now settled, that those lands do not pay tithes by reason of the word “privileges;” and not being a personal privilege in the king, but a real discharge of the land given by the statute, this exemption extends to the lessees of the crown, *quamdiu propriis manibus excolunt*. ⁽²⁾ So it has been decided, that all the clauses of 31 Hen. VIII. c. 13. respecting the possession of monasteries, relate to those lands which came to the king after the 4th of February, 27 Hen. VIII.; and that the lands of any such monasteries are exempt from payment under it, even though the crown may have granted them away before that statute was passed. ⁽³⁾

The statute of 31 Henry VIII., in addition to its preserving and continuing these several modes of discharge that were before the statute, and conveying them over to the king and lay persons, which would otherwise have vanished with the spiritual bodies themselves to which they were annexed, created a new discharge, before that time unknown at common law ⁽⁴⁾;

⁽¹⁾ Whitton v. Weston, Latch R. 89. Godb. R. 392.

⁽²⁾ Fosset v. Franklin, Sir Tho. Raym. 225. Gwm. 1579.

⁽³⁾ Tate v. Skelton, Gwm.

1503. Gerrard v. Wright, Cro. Jac. 607.

⁽⁴⁾ The Archbishop of Canterbury's case, 2 Rep. 46. Slade v. Drake, Hob. R. 297. Gerrard v. Wright, Cro. Jac. 608.

that is, "the unity of possession of the parsonage and the land tithable."

Thus where the rectory and the land remained from time immemorial under one title, it necessarily followed, that no tithes was paid from time immemorial, for a person could not pay tithe to himself, and consequently this kind of prescriptive right operated as a discharge; but if the possession of the land had been severed from the rectory, the land again would have become liable to the payment of tithes. (1)

Of unity of possession.

This is therefore more properly a *suspension* than a discharge; the unity being of the land in a temporal, and of the tithes in a spiritual capacity, both of equal estate of inheritance, in one person; so that it was necessarily a discharge, though of a temporary nature, from the payment of tithes. If land was discharged in respect of unity at the time of the dissolution, it shall now be discharged by force of the stat. 31 Hen. VIII. (2)

In this case of unity, four things are to be observed; the unity must be *justa, æqualis, libera, et perpetua*. (3)

The four requisites of unity.

(1) *Benton v. Trot, Moore*, 528.
(2) *Button v. Long*, Cro. E. 584.
(3) *Doubitofte v. Curteen*, Cro. Jac. 452.

First; the unity must be just; that is, right-ful, or obtained by good and lawful title.

Secondly; it must be equal; that is, the fee in the personage and the land in the same person or body, for had the abbots and priors held by lease, there is not a unity within the statute. (1)

Thirdly; it must be free; that is, free of payment from tithes, for had either the abbot or his farmer paid them, thereby proving that there was not a real discharge, but a non-payment by unity originating since the time of memory only, the prescription is destroyed. (2)

Fourthly; it must be perpetual; time out of mind: the lands and rectory must have been united before the memory of man, and therefore before the time of Richard the First's return from the holy wars; for if it can be shown that the abbey was founded or endowed with the lands or rectory after that period, the union is not sufficient. (3)

Of persons
claiming a
discharge by
unity.

Hence if the land and the rectory were in the possession of the abbot and his predecessors at the time of the dissolution of the monastery, and

(1) *Dickinson v. Reade*, 11 Rep. 14 b. and *Napper v. Napper*, 11 Rep. 14 b.

(2) *Degge*, c. 21. 335. *Prid.* (3) *Prowse v. Dr. Leyfield*, Gwm. 264.

also have been so from time immemorial, if it does not appear that tithes had ever been paid; such land is now *prima facie* discharged of tithes by the 31 Hen. VIII. c. 13. (1) But it is not sufficient to show that the land was parcel of the abbey at the time of the dissolution, the abbey must also have had a right to prescribe; to prove that it had the right it must have been in possession time immemorial. (2) As unity is not itself a discharge of tithes, but a discharge of the payment of them, it must be pleaded specially; ~~as~~ that the lands were in the hands of the abbots, and discharged in their occupation. (3)

It has been said, that if at the time the abbeys were dissolved, the lands were in lease for years, and the lessee paid tithes, the presumption arising from the perpetual unity of possession is thereby destroyed. (4) It has been however adjudged otherwise, for *quoad* the abbot, the inheritance was discharged of tithes, and the king or his grantees holds it discharged, as the abbot held it for the inheritance; and such lands are therefore now tithe-free. (5)

(1) Slade v. Drake, Hob. 296. Archbishop of Canterbury's case, 2 Rep. 48.

(2) Clavill v. Oram, Gwm. 1364.

(3) Hanking v. Gay, Bunb.

(4) Lord v. Turk, Bunb. 122. Slade v. Drake, Hob. 296.

(5) Porter v. Bathurst, Crn. Jac. 559. Cowley v. Keys, Gwm. 1308.

First: the unity must be just; that is, it must be obtained by good and lawful title.

Secondly; it must be equal; that is, the personage and the land in the same sort of body, for had the abbots and priors in tenure, there is not a unity within the statute.

Thirdly: it must be free; that is, free payment from tithes, for had either the abbot or the convent paid them, thereby proving that it was not a real discharge, but a non-payment of tithes originating since the time of memory or the prescription is destroyed.

Fourthly: it must be perpetual; time out of mind: the lands and rectory must have been in the possession of the abbey before the memory of man, and therefore before the time of Richard the First's return from the Holy Wars: for if it can be shown that the abbey was founded or endowed with the lands or rectory after that period, the union is not sufficient.

1. If the lands and the rectory were in the possession of the abbot and his predecessors at the time of the dissolution of the monastery, and

Dickinson v. Reade. 11 Rep. 14 b.
 1. 555.
 2. 555. Pridg. (2) Gwyn.

also have been so from time immemorial, if it does not appear that tithes had ever been paid, such land is now *prima facie* discharged of tithes by the 31 Hen. VIII. c. 13. (1) But it is not sufficient to show that the land was parcel of the abbey at the time of the dissolution, the abbey must also have had a right to prescribe; to prove that it had the right it must have been in possession time immemorial. (2) As unity is not itself a discharge of tithes, but a discharge of the payment of them, it must be pleaded specially; and that the lands were in the hands of the abbots, and discharged in their occupation. (3)

It has been said, that if at the time the abbeyes were dissolved, the lands were in lease for years, and the lessee paid tithes, the presumption arising from the perpetual unity of possession is thereby destroyed. (4) It has been however adjudged otherwise, for *quoad* the abbot, the inheritance was discharged of tithes, and the king or his grantee holds it discharged, as the abbot held it for the inheritance; and such lands are therefore now tithe-free. (5)

(1) Slade v. Drake, Hob. 298. Archbishop of Canterbury's case, 2 Rep. 48.

(2) Clavill v. Oram, Gwm. 1854.

(3) Hanking v. Gay, Busb.

(4) Lord v. Turk, Bunb. 122. Slade v. Drake, Hob. 298.

(5) Porter v. Bathurst, Crn. Jac. 559. Cowley v. Keys, Gwm. 1808.

Hence, then, of these five ways of discharge, three, (that is to say, by bull, by composition, and by order,) are preserved and upheld by the statute 31 Henry VIII. The fourth, prescription, stands as by common law, and has no need of any statute; while the fifth, which is unity, is expressly created by it. And those lands which the abbots held discharged at the time of making this statute by any of the privileges or modes above mentioned, the king, and all others claiming under him, now in like manner hold discharged as freely as the abbot held them at the day of the dissolution. (¹)

Where lands have been held tithe-free since the dissolution. Where the lands of a religious house have been held since the dissolution free from the payment of tithes, though the titles of discharge under the 31 Henry VIII. are now lost, and the manner of discharge cannot be made out, yet it will be presumed that they were discharged by some way or other before the dissolution, when in the hands of the abbots (²); and it will be sufficient to allege that they were part of the possessions of the monasteries, and were at the time of the dissolution discharged from the payment of tithes, by composition, prescription, or some other lawful way. (³) Where the discharge is by order only, it will not be enough to state in

(¹) *Wright v. Gerrard*, Hob. R. 509. *Benton v. Trot*, Gwm. 208. *Moore*, 528.

(²) *Wood's Inst.* L. E. 180.

(³) *Lamprey v. Rooke*, Amb. 291. *Nash v. Molins*, Cro. El. 206. *Bunb.* 66.

the pleading, that the lands were in the abbot's hands, and belonging to one of the greater monasteries at the time of the dissolution, but a discharge at that period should also be specified. ⁽¹⁾ And if it could be clearly shown that land which has regularly paid tithe was discharged, in the hands of a prior, the priory being vested in the king by the statute, such payment would not make it chargeable. ⁽²⁾

The fact of the lands belonging to a monastery, &c. is generally shown by the survey of their lands, at or soon after the time of their dissolution, or by some other public document ⁽³⁾, and these surveys are admissible, although the commissions under which they were taken are not to be found. ⁽⁴⁾ *

Lands belonging to a monastery how proved.

⁽¹⁾ *Hanking v. Gay*, Bunb. 37.

⁽²⁾ *Earl of Clanrickard v. Lady Denton*, Gwm. 360.

⁽³⁾ *Peake's Ev.* 478.

⁽⁴⁾ *Phil. on Ev.* 304. *Underhill v. Durham*, Gwm.

542. *Vicar of Kellington v. Trinity College*, 1 Wils. R. 170.

* The number of monasteries suppressed altogether in England were six hundred and forty-five, of which twenty-eight had abbots who enjoyed a seat in parliament; ninety colleges in different counties; two thousand three hundred and seventy-four free chapels and chantries; one hundred and ten hospitals: the yearly value of all of which were one hundred and sixty-one thousand one hundred pounds, besides the money arising from cattle, corn, timber, lead, plate, and other valuable church ornaments. Lord Her-

bert's Life of Hen. VIII. p. 506. Camden. Sir R. Baker's Chron. 287. Howe's An. 571. Hume's Hist. Eng. ch. 81. 4 Inst. 44. Spelman's Tracts, published in 1704. 3 Hollingshed's Chr. 939. See also Tan. Not. Mon., and 1 Inst. 94. a. to 97. In 2 Inst. 536.; Lord Coke says there were twenty-six abbots and two priors who had baronies, and thereby were also Lords of Parliament; and when the monasteries were dissolved, the lords lost so many members. For a curious account of the construction of monasteries, see Whitaker's Hist. of Wharfedale, lib. ii. c. 2. 104.

A CATALOGUE of the several Monasteries on the general survey taken in the 26 Hen. VIII., returned to be of the yearly value of 200l. and upwards, dissolved by the statute of the 31 Hen. VIII. and by that means capable of being discharged of tithes; in which are the following abbreviations :

Ab. *abbey*; pr. *Priory*; C. Aust. *Canons of St. Austin*; Bl. M. *Black Monks*; Wh. C. *White Canons*; Ben. *Benedictines*; Gilb. *Gilbertines*; Præm. *Præmonstratenses*; Carth. *Carthusians*; Mon. *Monks*; Clun. *Cluniacs*; Cist. *Cistercians*; T. *in the time of*; ab. *about the year*.

BERKSHIRE.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Reading -	Ben.	T. Hen. I.	1,938	14	3
Bustesham ab.	C. Aust.	13 Edw. III.	285	0	0
Abington ab.	Ben.	720	1,876	10	9

BEDFORDSHIRE.

Newnham pr.	C. Aust.	T. Hen. I.	299	15	11
Elmiston ab.	Ben.	T. W. Conq.	284	12	11
Wardon ab.	Cist.	1139.	589	16	8
Thicksand pr.	Wh. C. Gilb.	T. W. Rufus	212	3	8
Dunstable ab.	C. Aust.	T. Hen. I.	344	13	3
Wooburn ab.	Cist.	T. John	391	18	2

BUCKINGHAMSHIRE.

Ashrugg coll.	C. Aust.	T. Edw. I.	416	16	4
Woteley ab.	C. Aust.	1112.	457	6	6
Wissenden ab.	Ben.	1293.	261	14	8

CAMBRIDGESHIRE.

Thorney ab.	Ben.	972.	411	12	11
Barnwell pr.	C. Aust.	1092.	253	11	10
Ely	Ben.	970.	1,004	6	10

CESHIRE.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
St. Werburge ab.	- Ben.	- 1095.	- 1,003	5	11
Combermeer ab.	- Cist.	- 1134.	- 225	9	7

CORNWALL.

Bodmin pr.	-	C. Aust.	- 986.	-	270	0	11
Launceston ab.	-	C. Aust.	- T. W. Conq.	-	354	0	11
St. German's ab.	-	C. Aust.	- T. Ethelstan	-	243	8	0

CUMBERLAND.

Carlisle pr.	-	C. Aust.	- T. W. Rufus	-	418	3	4
Holme Coltrom ab.	-	Cist.	- 1135.	-	427	19	6

DERBYSHIRE.

Darby ab.	-	C. Aust.	- T. Hen. II.	-	258	14	5
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DEVONSHIRE.

Ford ab.	-	Cist.	- 1133.	-	374	10	6
Newnham ab.	-	Cist.	- Ab. 1246.	-	227	7	8
Dinkeswel ab.	-	Cist.	- 1201.	-	294	18	6
Hertland ab.	-	C. Aust.	- T. Hen. II.	-	306	8	2
Torre ab.	-	Præm.	- T. Ric. I.	-	396	0	11
Buckfast ab.	-	Cist.	- T. Hen. II.	-	466	11	2
Plimpton ab.	-	Cist.	- T. Edw. I.	-	241	17	9
Tavistock ab.	-	Ben.	- 961.	-	902	5	7
Exon pr.	-	Clun.	- T. Hen. I	-	502	12	9

DORSETSHIRE.

Abbotsbury	-	Ben.	- Ab. 1016.	-	390	19	2
Middleton ab.	-	Ben.	- T. Ethelstan	-	538	13	11
Tarrent ab.	-	Cist.	- By Hen. III.	-	214	7	9
Shafton ab.	-	Ben.	- 941.	-	1,166	8	9
Cerne ab.	-	Ben.	- T. Edgar	-	515	17	10
Sherburn ab.	-	Ben.	- Ab. 370.	-	682	14	7

DURHAM.

S. Cuthbert ab.	-	Ben.	- Ab. 842.	-	1,366	10	9
Tinmouth pr.	-	Ben.	-	-	397	11	6

ESSEX.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Berking ab. -	Ben. -	680. -	-	862	12 5
Stratford Langthorn ab. -	} Cist. -	1135. -	-	511	16 3
Waltham ab. -		Ab. 1060. -	-	900	4 3
Walden ab. -	Ben. -	1136. -	-	372	18 1
St. Oswith ab. -	C. Aust. -	1120. -	-	677	1 2
Colchester ab. -	C. Aust. -	T. Hen. I. -	-	523	17 0

GLOUCESTERSHIRE.

Bristol ab. -	C. Aust. -	T. Hen. I. -	-	670	19 11
Hayles ab. -	Cist. -	1246. -	-	357	7 8
Winchcomb ab. -	Ben. -	787. -	-	759	11 9
Tewkesbury ab. -	Ben. -	715. -	-	1,598	1 5
Cirencester ab. -	C. Aust. -	T. Hen. I. -	-	1,051	7 1
King's Wood ab. -	Cist. -	1139. -	-	244	11 2
Gloucester ab. -	Ben. -	680. -	-	1,946	5 9
Lanthony pr. -	C. Aust. -	1136. -	-	648	19 11

HAMPSHIRE.

St. Swithin's Win-	} Ben.	-	634.	-	1,507	17	2
ton ab.		-					
Hyde ab.	-	Ben.	-	By K. Alfred	865	18	0
Wherwel ab.	-	Ben.	-	By K. Edgar	339	8	7
Romsey mon.	-	Ben.	-	907.	-	393	10 10
Twinham pr.	-	C. Aust.	-	Before 1042.	-	312	7 0
Belloloco ab.	-	Cist.	-	1024.	-	326	13 2
Southwick pr.	-	C. Aust.	-	T. Hen. I.	-	257	4 4
Titchfield ab.	-	Præm.	-	T. Hen. III.	-	249	16 1

HERTFORDSHIRE.

St. Alban's ab. -	Ben. -	755. -	-	2,102	7 1
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HUNTINGDONSHIRE.

St. Neots ab.	Ben.	-	Ab. t. Hen. I.	241	11	4
Ramsey ab.	Ben.	-	969.	-	1,716	12 4

KENT.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
St. Austin's Cant. ab.	Ben.	605.	1,413	4	11
Ledis pr.	C. Aust.	1119.	362	7	7
Feversham ab.	Clun.	1147.	286	12	6
Boxley ab.	Cist.	1144.	204	4	11
Roffen ab.	Ben.	600.	486	11	3
Mallin ab.	Ben.	by K. Edmund	218	4	2
Dertford ab.	C. Aust.	1372.	380	0	0

LANCASHIRE.

Whalley ab.	Cist.	1172.	321	9	1
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LEICESTERSHIRE.

Leicester ab.	C. Aust.	1143.	951	14	5
Croxdon ab.	Praem.	ab. Ric. I.	385	0	10
Launda ab.	C. Aust.	T. W. Rufus	399	3	3

LINCOLNSHIRE.

Lincoln St. Cath. pr.	Gilb.	T. Hen. II.	202	5	0
Kirkstead ab.	Cist.	1139.	286	2	7
Revesly ab.	Cist.	1142.	287	2	4
Thorton ab.	C. Aust.	1139.	594	17	10
Barney ab.	Ben.	712.	366	6	1
Croyland ab.	Ben.	716.	1,803	15	10
Spalding ab.	Ben.	1052.	761	8	11
Sempringham ab.	Gilb.	1148.	317	4	1
Epworth mon.	Carth.	1386.	237	15	2

LONDON and MIDDLESEX.

St. John Jerusalem pr.	-	1000.	2,385	12	8
St. Barth. Smithfield	C. Aust.	1102.	653	15	9
St. Mary Bishops- gate pr.	-	1187.	478	6	6
Clerkenwell pr.	Ben.	T. Stephen.	262	19	0
London Minors.	Ben.	T. Edw. I.	318	8	5
Westminster ab.	Ben.	T. Edgar	3,471	0	8
Sion ab.	C. Aust.	by Hen. V.	1,731	8	4

LONDON and MIDDLESEX — *continued.*

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
London, a house of,	Carth.	T. Edw. III.	642	0	2
St. Clare without } Aldgate mon. }	-	1292.	418	8	5
St. Mary Charter- house }	Carth.	1379.	736	2	7
St. John Holiwell -	Bl. M.	1318.	347	1	3
St. Mary, East- Smithfield, ab. - }	Cist.	1360.	602	11	10

NORFOLK.

Thetford ab.	-	Clun.	-	1108.	-	312	14	4
Wymundham ab.	-	Ben.	-	1139.	-	211	16	6
Hulmo ab.	-	Ben.	-	by Canute	-	583	17	0
Westderham ab.	-	Præm.	-	T. Hen. II.	-	228	0	0
Walsingham ab.	-	C. Aust.	-	ab. t. Stephen	-	391	11	6
Castle-acre ab.	-	Clun.	-	1090.	-	306	11	4
West-acre ab.	-	Clun.	-	T. W. Rufus	-	260	13	7

NORTHAMPTONSHIRE.

Burgi St. Peter ab.	Ben.	-	{ by Rosere K. of Mercia }	1,721	14	0
Pipewell ab.	-	Cist.	-	1145.	-	286 11 8
St. Andrew's pr.	-	Clun.	-	1067.	-	263 7 1
Sulby ab.	-	Præm.	-	T. Stephen	-	258 8 5

NOTTINGHAMSHIRE.

Lenton pr.	-	Clun.	-	T. Hen. I.	-	329	5	10
Thuragarton pr.	-	C. Aust.	-	T. Hen. I.	-	259	9	4
Welbeck ab.	-	C. Aust.	-	T. Stephen	-	240	8	3
Warsop pr.	-	C. Aust.	-	-	-	239	10	3
Bella Valla pr.	-	Carth.	-	ab. 16 Ed. III.	-	227	8	0
Newstead pr.	-	C. Aust.	-	T. Edw. III.	-	219	18	8

The two last are under value in Dugdale, but thus by Speed.

NORTHUMBERLAND.

Tinmouth, a cell to St. Alban's, a nunnery	-	511	4	1
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OXFORDSHIRE.

Monasteries.		Order.	Founded.	Value.		
				£.	s.	d.
Godstow ab.	-	Ben.	T. Stephen	274	5	10
Eynesham ab.	-	Ben.	by Etheldred	441	12	2
Osney ab.	-	C. Aust.	T. Hen. I.	654	10	2
Thame ab.	-	Cist.	T. Hen. I.	286	13	11
Oxford pr.	-	-	before Conq.	224	4	8
Dorchester ab.	-	C. Aust.	635.	219	12	0

SHROPSHIRE.

Haghmond ab.	-	C. Aust.	1100.	259	13	7
Lilleshul ab.	-	C. Aust.	{ by Elfreda K. of Mercia }	229	3	1
Wigmore ab.	-	C. Aust.	1172.	267	2	10
Wenlock pr.	-	Clun.	1181, or before	401	0	7
Salop ab.	-	C. Aust.	1081.	615	4	3
Hales Owen ab.	-	Præm.	T. John	337	15	6

SOMERSETSHIRE.

Glassenbury ab.	-	Ben.	about 300.	3,311	7	4
Brewton ab.	-	C. Aust.	ab. t. Conq.	439	6	8
Henton pr.	-	Carth.	T. Hen. III.	248	19	2
Witham pr.	-	Carth.	by Hen. II.	215	15	0
Taunton pr.	-	C. Aust.	T. Hen. I.	286	8	10
Bath ab.	-	Ben.	T. Hen. III.	612	2	6
Keynesham ab.	-	C. Aust.	T. Hen. I.	419	14	3
Michelsay ab.	-	Ben.	740.	447	4	11
Buckland pr.	-	Cist.	T. Edw. I.	223	7	4

STAFFORDSHIRE.

Dela Cress ab.	-	Cist.	1153.	227	5	0
Burton upon Trent	-	Ben.	T. Eadred	267	14	3
Croxden ab.	-	Cist.	-	-	-	-

SUFFOLK.

St. Edmundsbury ab.	-	Ben.	1020.	1,659	13	11
Butley ab.	-	C. Aust.	1171.	318	17	2
Sibton ab.	-	Cist.	1150.	250	15	7
Ixworth pr.	-	C. Aust.	T. W. Conq.	280	9	5

SURREY.

Monasteries.	Order.	Founded.	Value.		
			£.	s.	d.
Merton pr. - -	C. Aust. -	1414.	-	957	19 5
Shene pr. - -	Carth. -	1414.	-	777	12 0
Chertsey ab. - -	Ben. -	666.	-	659	15 8
Newark pr. - -	- -	-	-	253	11 11
St. Maryovers ab. -	C. Aust. -	1106.	-	625	6 6
Bermundsey ab. -	C. Aust. -	1106.	-	474	14 4

SUSSEX.

Lewes ab. - -	Clun. -	T. W. Rufus -	920	4	6
Robertsbridge ab.	Clist. -	T. Hen. II. -	248	10	6
Battaile ab. - -	Bl. M. -	1066.	-	987	0 11

WARWICKSHIRE.

Combe ab. - -	Cist. -	T. Steph. -	311	15	2
Kenelworth ab. -	C. Aust. -	T. Hen. I. -	588	12	10
Meryval ab. - -	Cist. -	1148.	-	254	1 8
Naneaton mon. -	Ben. -	T. Hen. II. -	253	14	5

WILTSHIRE.

Malmsbury ab. -	Ben. -	ab. 670.	-	803	17 7
Bradenstock pr. -	C. Aust. -	T. W. Conq. -	212	19	8
Edington pr. - -	C. Aust. -	1352.	-	442	19 7
Ambresbury ab. -	Ben. -	1177.	-	494	15 2
Wilton ab. - -	Ben. -	T. Ethelwolf -	601	1	1
Fairly, a cell to Lewis	Clun. -	1125.	-	217	0 4
Laycock ab. - -	C. Aust. -	1282.	-	203	12 3

WORCESTERSHIRE.

Malverne ab. - -	Ben. -	1083.	-	308	1 3
Evesham ab. - -	Ben. -	T. Offa -	1,183	12	9
Pershore ab. - -	Cist. -	-	-	643	4 3
Hales Owen ab. -	Præm. -	T. John -	282	13	4
Bordesley ab. - -	Cist. -	1138.	-	388	1 1

YORKSHIRE.

St. Mary York ab.	Ben. -	1088.	1,550	7	0
Selby ab. - -	Ben. -	T. W. Conq. -	720	12	10

YORKSHIRE — *continued.*

Monasteries.	Order.	Founded.	Value.
			£. s. d.
Kirkstall ab. - -	Cist. -	1147. -	329 2 11
De Rupe ab. - -	Cist. -	1147. -	224 2 5
Monks Burton ab.	Clun. -	ab. 1186. -	239 3
Nostel ab. - -	C. Aust. -	T. Hen. I. -	492 18
Pomfrait ab.	Clun. -	T. W. Conq. -	237 14
Gisbourn ab. -	C. Aust. -	T. Stephen -	628 3
Whithy ab. - -	Ben. -	T. W. Conq. -	437 2 9
Montegratia - -	Carth. -	ab. 1396. -	323 2 10
Newburge pr. -	C. Aust. -	1145. -	367 8 3
Belland ab. - -	Cist. -	1134. -	238 9 4
Kirkham ab. - -	C. Aust. -	T. Hen. I. -	269 5 9
Melsa ab. - -	Cist. -	1136. -	299 6 4
Brilington pr. -	C. Aust. -	T. Hen. I. -	547 6 11
Walton ab. - -	Gilb. -	T. Stephen -	360 16 10
Bolton in Craven pr.	C. Aust. -	T. Hen. I. -	212 3 4
Rival ab. - -	Cist. -	1132. -	278 10 2
Jervall ab. - -	Cist. -	T. Stephen -	234 18 5
Furnes ab. - -	Cist. -	1127. -	803 16 5
De Fontibus - -	Cist. -	1132. -	998 6 8
Warter pr. - -	C. Aust. -	T. Hen. I. -	221 3 10
Richal - - -	- - -	- - -	351 14 6
Old Moulton ab. -	- - -	T. Stephen. -	257 7 0
St. Michael near Hull.	Carth. -	1377. -	231 17 0

IN WALES.

Valle de Sancta	}	Cist.	-	T. Edw. I.	-	214	3	5
Cruce in Den- beighshire								
Strata Florida in Cardiganshire -	}	Cist. or Clun.		T. W. Conq.		1,226	6	0

CHAP. III.

Of Prescriptions in non decimando, and Prescriptions in modo decimandi.

SECTION I.

Of Prescriptions in non decimando.

THE several discharges from the payment of tithes by bull, by composition, by prescription, by order, and by unity of possession, have been considered in the preceding chapter.

In addition to these, two other kinds of discharges must now be added; the one of a general, the other of a partial nature.

1. A prescription *de non decimando*; to be entirely discharged from the payment of tithes, without rendering any compensation whatever in lieu thereof. (1)

Definition of
a prescription
in non
decimando.

2. A *modus decimandi*, commonly called by the simple name of a *modus*; where there is by immemorial usage some partial or particular

Definition of
a modus
decimandi.

(1) 2 Wood. Vin. Lect. 22. 99. 3 Cruise's Dig. tit. 22.
§ 8. Gibs. Cod. 674.

manner of tithing allowed, different from the general law of taking tithes in kind. (1)

In general laymen cannot prescribe in non decimando.

It is a general rule that no layman can prescribe in *non decimando*, of things due of common right, unless he derives his title from some religious or ecclesiastical privileged person (2); and the mere non-payment of tithes by him from time immemorial, cannot be successfully set up as a defence against a person claiming them, whether he is a lay impropiator (3), or ecclesiastical rector. (4)

All spiritual persons may prescribe.

But all spiritual and religious persons, as bishops, deans, prebendaries, and parsons (as formerly abbots and priors), being more favoured than laymen, may prescribe generally in *non decimando* (5); and their leasees, tenants, and copyholders, may make use of such prescriptions to exempt them from the payment of

(1) 2 Inst. 490. 2 Black. C. 29. Hall and Another v. Maltby, 6 Pr. R. 255.

(2) Sherwood v. Winchcomb, Cro. El. 293. Webb v. Warner, Cro. Jac. 47. Breary v. Manby, 3 Wood's D. 43. Selden, c. 13, § 2. 1 Roll, Abr. 653. Allen v. Pory, 2 Keb. 45. Bish. of Winchester's case, 2 Rep. 44.

(3) Charlton v. Charlton, Bunb. 325. Corporation of Bury v. Evans, Bunb. 345.

(4) Nagle v. Edwards, 3 Anst. 702. 945. See page 19. and the cases there cited.

(5) Bish. of Lincoln and Cowper's case, 1 Leon. 248. Nash v. Molins, Cro. El. 206.

tithes, this privilege being for the benefit of the church. (1)

This rule, that none but spiritual persons may prescribe in *non decimando*, is however to be understood with several exceptions. Exceptions to the rule against laymen.

First, the king, though not discharged by virtue of his prerogative, being *mixta persona*, is capable of prescribing in *non decimando*. (2) 1. The king.

It has been said, that being a personal discharge in the king, if he grants it over, his grantee will not be discharged, but that the prescription is destroyed for ever; and if therefore the land comes ever back to the crown by escheat, it will not be discharged of tithes. (3) His farmers and lessees.

But the king's patentees of those abbey lands that came to the crown by the statute of *St Henry VIII.*, referred to in the last chapter, may take advantage of a prescription *de non decimando* in the abbot, prior, or other religious person, by the force of that statute; and the enjoyment of the lands since the dissolution, free from the payment of tithes during

(1) *Wickham v. Cooper*, Cro. El. 216. *Stephenson v. Hill*, 3 Bur. 1273. 1 Roll. Abr. 653. *Wright v. Wright*, Cro. El. 475. *Crouch v. Fryer*, Cro. El. 784.

(2) *Hertford v. Leech*, Sir W. Jon. R. 387. *Compost v. —* Hard. 315.

(3) *Hotham v. Foster*, Gwm. 869. *Compost v. —*, Hard. 315. *Morant v. Cumming*, Cro. Car. 94.

Privilege
does not ex-
tend to his
feoffee.

memory, is a good proof, *a posteriori*, that the abbots and priors held them discharged. ⁽¹⁾ So it has been laid down, that at common law the king's tenants are capable of holding lands discharged on account of his royal prerogative, which renders it beneath his dignity to cultivate them himself. ⁽²⁾ And those abbey-lands thus discharged of tithes are also discharged in the hands of the grantee of the crown, although at the time the abbey was dissolved, they were in lease for years, and the lessee paid tithes. ⁽³⁾ So lands lying in a forest, and in the hands of the king, may, by prescription, be exempt from tithes although they are within a parish; but this privilege can only extend, as has been observed, to the king's lessee, and not to his feoffee or patentee ⁽⁴⁾; and the lessee must prove the prescription, as otherwise crown-lands are not exempt from tithes, the king or his lessees being only capable of such a prescription, without which he is not even discharged of tithes for the ancient demesnes of the crown. ⁽⁵⁾

⁽¹⁾ Degge, c. 16. 306.
3 Com. Dig. tit. Dis. E. 7.

⁽²⁾ Degge, c. 21. 334. In-
gelsby v. Ullethorn, Hard. 381.
Anon. Owen, 46. Countess
of Linnox case, 2 Leon. 71.
Anon. Moore, R. 915.

⁽³⁾ Porter v. Bathurst, Cro.
Jac. 559. Cowley v. Keys,
Gwm. 1308.

⁽⁴⁾ Comin's case, Het. 60.
Hotham v. Foster, Gwm. 869.
Hertford v. Leech, Sir W. Jon.
R. 387. Bannister v. Wright,
Styl. R. 187.

⁽⁵⁾ 2 Wood. Vin. Lect. 22.
101. Hard. R. 315.

for it. Hence the presumption arising from a mere retainer of tithes, without having any grant or pernanacy, will not alone be sufficient to exempt land; it must be shown, either that the lands were parcel of the possessions of one of the privileged religious houses or orders, at the time of the dissolution, and then exempt from tithe, the nature of which exemption has been considered in the last chapter; or, that a real composition had been made, by which the tithes were released (¹); which composition will not be presumed from usage; but must be shown either by the production of the deed, or express reference to it.

tithes not a sufficient discharge.

In urging an exemption by such a real agreement, the following material circumstances merit attention.

A real composition (unlike a modus, which will become a subject of future consideration,) must have its commencement *within* time of memory, therefore between the reign of Richard the First and the thirteenth of Elizabeth; which commencement must be established either by the production of the deed of composition, or such evidence from whence, independent of mere usage, it may

Discharge by real composition of lands not belonging to a monastery.

(¹) *Berney, v. Harvey*, 17 Gwm. 1354. *Slade v. Drake*, Ves. 119. *Clavill v. Oram*, Hob. 295.

be inferred that the deed once existed. (1) And the reason why this has been so held, is stated to be, that if it were otherwise, the church would be defrauded, and every bad modus turned into a good composition. (2) If, says Mr. Baron Graham, you were allowed to support a defence of composition real by parol evidence of usage, so as to change it into a modus, it is perfectly clear that no man in his senses would ever plead a modus, because by pleading at once a composition real, a defendant would have the advantage of non-usage; and thus get rid of the objection as to rankness on all occasions. Not only so, but we should make every modus a composition real, and thus altogether expunge the doctrine of moduses. (3) Without such evidence of a deed, a composition real cannot be proved by reputation, though such reputation is corroborated by evidence of non-payment of tithe. (4) For the bare fact of

(1) *Heathcote v. Mainwaring*, 3 Brown's R. 217. *Sawbridge v. Benton*, 2 Anstr. 372. *Bennett v. Neale and Others*, Wightw. R. 324. *Bennett v. Skeffington*, 1 Daniell's Rep. 10. *Startup v. Doderidge*, Gwm. 587. *Chatfield v. Fryor*, 1 Pr. R. 253.

(2) *Phil. on Ev.* 120. Gwm. 1948. *Hawes v. Swaine*, 4 Woods. D. 313.

(3) *Ward v. Shepherd*, 3 Price's Rep. 625. *Robinson v. Appleton*, Gwm. 1101. *Heathcote v. Mainwaring*, 3 Br. C. Rep. 217. *Sed vid. Leech v. Bailey*, 6 Price's Rep. 508.

(4) *Chatfield v. Fryer*, 1 Price's R. 253. *Bennett v. Skeffington*, 1 Daniell's Rep. 10.

a parson having been in possession of less than what is due to him, or of that which is due in a less beneficial manner, is not of itself a ground for presuming a real composition ⁽¹⁾; and a deed creating a composition real will not be presumed from payments for two hundred years of a sum of twenty pounds in lieu of tithes. ⁽²⁾

Also, since the statute of 13 Eliz. for preventing the alienation of ecclesiastical estates, no composition of this kind can be made, and such therefore as appear to be of a later date are invalid. The length of enjoyment, which in other cases is the best possible title, serves here only to weaken the claim of exemption from tithes, as the difficulty of tracing its origin is increased. ⁽³⁾ So that though the law allows of a layman's being discharged by grant, when it appears; yet if it appears not, it is presumed, that it never was, because of the dangerous consequences of presuming the contrary. ⁽⁴⁾ And the law, says Lord Coke, has great policy therein, for that laymen (to the trial of whom all prescriptions are to be put) will rather strain their consciences for their private benefit, than

No composition good made since 13 Eliz.

⁽¹⁾ Knight v. Halsey, in error, 2 Bos. & Pull. 206.

⁽²⁾ Estcourt v. Kingscote, 4 Mad. Rep. 140.

⁽³⁾ Lord Petre v. Blencood, 3 Ainst. R. 945. Rose v. Calland, 5 Ves. 186.

⁽⁴⁾ Slade v. Drake, Hob. 297. Jennings v. Lettis, Gwm. 952. Nagle v. Edwards, 3 Ainst. R. 702. Meade v. Norbury, 2 Pr. 338. Fanshaw v. Rotheram, 1 Ed. R. in note, 303.

yield to the church the duties that belong thereto, and the decay of the revenues of men of holy church, in the end, will be overthrown. ⁽¹⁾

Grant here
not pre-
sumed.

Hence though immemorial custom is in general evidence even for presuming deeds against the crown, or sufficient for a jury to presume an agreement beyond time of memory in support of a *modus decimandi*; yet in the particular instance of a composition for tithes, it is settled that the grant will not be presumed, and some evidence must be given referring to the deed, or showing that it did exist, independent of mere usage. ⁽²⁾

When, however, evidence is produced sufficient to show that a composition real was entered into, and there has been no dispute on the subject, as far back as living memory can go, with a clear perception of tithes, from all time which written evidence can reach, it may be presumed that every thing was done which was requisite, without proving the consent of the patron and ordinary to the real composition, which may be inferred from other facts and circumstances. Thus, in a very late case, Lord Chief Baron Richards held, that a composition real,

⁽¹⁾ Bishop of Winchester's case, 2 Rep. 44. | on Evidence, 119. Per Richards, Baron, in *Chatfield*

⁽²⁾ *Bennett v. Skeffington*, v. Frye, 1 Price's R. 260.
1 Daniell's Rep. 10. Phil.

or rather a grant of tithes made by a vicar to the lord of a manor, in consideration of his finding a priest to officiate in a chapel, and pay certain other dues, supported by evidence of constant perception and compliance with the conditions on which it was made, was valid; and though there was there evidence enough to conclude that the composition real had been entered into prior to the statute of 32 Hen. VIII. c. 7., which gave to laymen the right to sue for and recover their tithes, which by common law they were unable to do, his Lordship said, that had it been necessary to presume that the composition real was made subsequently to the 32 Hen. VIII., he should have felt himself bound to presume that it had been re-executed, and re-assented to after that time. (1)

SECTION II.

Of Prescriptions in Modo decimandi.

ANY special manner of tithing, or means whereby the general law of tithing is altered, is called a *modus decimandi*. Definition of a *modus decimandi*.

(1) MSS. *Ridley v. Storey*, | *bridge v. Benton*, Gwm. 1397.
 Dan. Rep. 157. et vid. *Saw-* | 2 Anstr. 372.

This is sometimes a pecuniary annual compensation, sometimes a composition in work and labour or otherwise; but in all cases a *modus decimandi* presumes a composition for tithes with consent of the parson, patron, and ordinary, before the time of memory.⁽¹⁾ Hence, it must be supposed to have had a reasonable commencement; that is, that the composition, at the time of making it, was fair and equitable, though it may appear different at present⁽²⁾; as it can hardly be imagined that the bishop, patron, and ordinary would have entered into a composition to the prejudice of the church; or, on the other hand, that a particular district would have incumbered itself unnecessarily; and if the *modus* does not accord with the present value of tithes, it must either be presumed that the tithes are improved, or it must be attributed to the depreciation in the value of money.

Deed need
not here be
produced.

Nor is it here necessary to produce the deed by which the composition was at first agreed upon; and it differs from a prescription *de non decimando* in this respect, that wherever there has been, for time immemorial, a constant annual payment in lieu of tithes, it will be supposed that the pay-

⁽¹⁾ Ord v. Clark, 3 Anst.
638. 2 Wood's Vin. Lect. 22.
105. 2 Bl. Com. 29. Bennett
v. Neale, Wight. R. 331.

⁽²⁾ Chapman v. Monson,
2 P. Wms. 573.

ment had a proper commencement ; and also in another material circumstance, that laymen, lords of manors, copyholders, parishes, hamlets, and private as well as spiritual persons, may all prescribe *de modo decimandi*.⁽¹⁾

Distinctions have been made in moduses relative to the lands over which they extend.

A general custom prevailing throughout a parish or district, is called a parochial modus.	Definition of a parochial modus.
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A prescription confined to a farm is called a farm modus.	Definition of a farm modus.
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The former extends to all tithes within a certain district, even over lands inclosed within time of memory, and to articles that are of modern introduction ; the latter is more confined, and does not extend either to articles recently introduced, or to newly inclosed wastes or commons. ⁽²⁾	Distinction between the two.
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To make a good and sufficient modus, several requisites must concur.	The requisites necessary to make a good modus.
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First ; every modus must be certain and invariable.⁽³⁾

(¹) *Bishop of Winchester's case*, 4 Rep. 44. | 3 Bur. 1375. *Heaton v. Cooke*, Wight. R. 282. *Bishop v. Chichester*, Gwm. 1323.

(²) *Scott v. Allgood*, Gwm. 1369. *Moncaster v. Watson*, | (³) 1 Keb. 602.

Secondly ; the thing given must be beneficial to the person to whom the tithe is due. ⁽¹⁾

Thirdly ; it must be something different in kind from the thing compounded for. ⁽²⁾

Fourthly ; it must not be one species of tithe in discharge for the payment of another. ⁽³⁾

Fifthly ; the recompence must be in its nature as durable as the tithes discharged by it. ⁽⁴⁾

Sixthly ; the modus must not be too large. ⁽⁵⁾

Must be certain.

First, it must be certain and invariable. If a modus is uncertain, or, as it has been called, a leaping custom, no length of time can make it good. A payment of different sums will prove it to be no modus, that is, no original real composition, because that must have been one and the same, from its first origin to the present time. ⁽⁶⁾ As however we often proceed most safely by negatives and exclusives to what is affirmative and inclusive, it may be advisable, first to state some few examples of moduses

⁽¹⁾ *Portinger v. Johnson*, Gwm. 286.

⁽²⁾ *Berd v. Adams*, Moore, R. 378.

⁽³⁾ *Grysmen v. Lewes*, Cro. El. 446.

⁽⁴⁾ *Carleton v. Brightwell*, 2 P. Wms. 462.

⁽⁵⁾ *Startup v. Dodderidge*, 2 Ld. Raym. R. 1158.

⁽⁶⁾ 2 Bl. Com. 29.

which have been considered void and bad upon the ground of uncertainty.

Thus a modus to pay a tithe-penny, or a penny *per annum*, or thereabouts, for every acre of land⁽¹⁾, a payment of four shillings for every day's wheat ploughing, two shillings for every day's ploughing of barley⁽²⁾, and one shilling in the pound on the yearly rent of rack-rented farms⁽³⁾, are all illegal, for their uncertainty. So to pay two shillings in the pound on the true improved yearly rent or value of the land was, for the same reason, held bad; for though it might be certain enough for a tenure or a contract, yet it is not so certain, that in consideration of it the Court would adjudge that the parson ought to be barred of his tithes in kind.⁽⁴⁾ For a certain duty, like the payment of tithes, the recompence should appear equally certain. Thus, where a modus of three-pence was claimed by the occupier of every oxgang of land, which oxgang was said to contain sixteen or about sixteen acres of arable, meadow, and pasture land, in lieu of the tithe of hay arising on the said oxgang, the modus was set aside upon the principle of its uncertainty. An oxgang itself,

What modus illegal from its uncertainty with reference to description.

⁽¹⁾ Chapman v. Monson, 2 P. Wms. 572.

⁽²⁾ Tooke v. Ledgier, 1 Keb. R. 612.

⁽³⁾ Bean v. Lee, Gwm. 609.

Harrison v. Sharp, Bunb. 174.
2 Wood's Dec. 224.

⁽⁴⁾ Startup v. Dodderidge, Ld. Raym. R. 1158.

indeed, is hardly a certain term ; it will contain a quantity of land, more or less, according to the quality of that land in different parts of the parish, and in this case there was no specification of proportions. Lord C. B. Eyre observed, that by the fluctuation of lands in this parish, it may happen that the arable may be occupied separate from the meadow or pasture ; as, for instance, suppose the number of acres in this parish would make one hundred oxgangs, at sixteen acres to an oxgang, and each of those oxgangs consisted of arable, meadow, and pasture land ; there would then be one hundred three-pences to be paid to the vicar, in satisfaction of his tithe for the meadow. But suppose one half of those oxgangs to have no meadow, and the whole meadow to be distributed amongst the other fifty ; in that case, the vicar would have but three-pence for each oxgang containing meadow, and therefore but fifty three-pences. (1) * In like manner, four-pence by each occupier having lands cultivated by the plough, with three or more horses, usually called a plough, in lieu of all small tithes of such lands so cultivated, where there was no averment of what quantity of

(1) *Markham v. Laycock*, Gwm. 1339. But the meaning there is ill expressed.

* An oxgang on the average may be fixed at twelve statute acres. Whit. Hist. of Craven, 9.

land a plough consisted, has been held a void modus on account of uncertainty. (1) Again, a payment of a fother of hay, which was said to be as much hay as two oxen and two horses could draw, in lieu of all tithe-hay, was set aside; as the quantity of hay depends on the condition of the soil, on the weather, on the goodness of the oxen and horses, and on the will of the occupiers, all uncertain and almost daily fluctuating. (2) A modus of four shillings payable at Easter in lieu of tithe-hay of a farm, (it being by no means settled of what a farm consists) (3); of a meadow called the parson's meadow, and the enjoyment of several beast-grasses by the tithe-owner and his predecessors in lieu of tithes (4); of a penny a cow for milch cows, *summered* on lands within a parish (5); to to carry a cart-load (which, as it may be drawn by two or by ten horses, must ever be variable) of peat and turf to the parsonage-house, in full discharge of all the tithe of hemp, flax, and hay (6); have all, on similar principles, been declared void and invalid.

So a modus of five shillings for every ten calves, where there happens to be ten, and two-

(1) *Blackburn v. Jepson*, 17 Ves. 477.

(2) *Fenwicke v. Lambe*, Gwm. 869.

(3) *Burwell v. Coates*, Bunb. 129.

(4) *Birch v. Stone*, Gwm. 649.

(5) *Rumney v. Beale*, 1 Daniell's Rep. 35.

(6) *Tully v. Kilner*, Bunb. 126.

and-sixpence for every five, in lieu of the tithe of such calves, and also of the tithe-milk of the cow belonging to such calves, called renew cows, or cows having had each a calf within the year, preceded by a modus of three halfpence for every cow called a renew cow, in lieu of the tithe of the milk of such cow, is objectionable on the ground of inconsistency, as well as that nothing is said to be paid for calves up to five, or from five to ten, or from ten upwards to any quantity. ⁽¹⁾

What sufficient certainty in a modus.

On the other hand, a customary payment every year of sixpence for every cow depastured within the parish, in lieu of tithe-milk and calves; a penny for every fleece of wool in lieu of tithe-wool shorn from every sheep fed therein; two-pence for every colt foaled; four-pence for every garden in lieu of garden-stuff; four-pence for potatoes tilled in a ridge in the field for family-use, and not for sale*; a penny for any small quantity of hemp sown every year by every occupier of lands within the parish; two-pence for Easter offerings in every year for every inhabitant of sixteen years or upwards; a penny for every pig, and three halfpence for every goose,

⁽¹⁾ *Layng v. Yarborough*, 4 Pr. R. 383.

* An additional argument that articles thus used are not *de jure* exempted from tithe. — Vide pages 70. 79. 80, 81.

where they did not amount to a tithable number ⁽¹⁾; a halfpenny for each calf in lieu of calves, payable on Wednesday before Easter; a halfpenny payable on shear-day for the wool of each sheep, dying between Candlemas and shear-day; four-pence a month for the tithe-wool of every hundred sheep in the parish; which were brought in after the second of February; three eggs for every cock; a smoke-penny in lieu of firewood burnt in the house ⁽²⁾; eight-pence a score in lieu of tithe-wool for sheep wintered in other parishes and brought in only a short time before shearing; four-pence for every acre of grass cut and made into hay, in lieu of the tithe of hay ⁽³⁾; a penny for every foal; two-pence for each milch cow; one penny for every heifer that hath had but one calf, in lieu of all milk and all profits arising by such cow and heifer except the calf ⁽⁴⁾; twenty-two shillings and eight-pence for hay, small tithes, and Easter offerings, for an ancient tenement containing six hundred and twenty-five acres ⁽⁵⁾; and of eight pounds for a farm of eighty pounds a year in lieu of tithes ⁽⁶⁾; have all been adjudged certain, valid, and good.

⁽¹⁾ *Boscawen v. Roberts*,
3 Wood's Dec. 174. Gwm.
946.

⁽²⁾ *Brinklow v. Edmonds*,
Bunb. 307.

⁽³⁾ *Thompson v. Holt*,
Gwm. 671. *Gills v. Horrex*,
Gwm. 861.

⁽⁴⁾ *Jenkinson v. Royston*,
1 Dan. R. 127.

⁽⁵⁾ *Finch v. Maisters*, Bunb.
161.

⁽⁶⁾ *Edge v. Oglander*, Gwm.
536.

Hence every
modus must
have suffi-
cient cer-
tainty of
description.

Hence it appears from the cases cited, in order to ascertain the certainty requisite to a modus, it must be so well defined as to admit of no variation arising from the will of the tithe-owner or occupier. This may be called certainty of *description*, as distinguished from certainty of *duration*, which will be hereafter considered; and the test of it is the exclusion of such an arbitrary power. Thus, to apply it to one of the instances selected, it is only to be considered whether or not the occupier, by augmenting the size of his farm, or modifying its divisions, or by any other means, may of his own accord diminish the amount of the tithe.

Must be
beneficial
to the tithe-
owner.

Secondly; the thing given must be beneficial to the tithe-owner.

Thus, the payment of five shillings to the parish-clerk, time out of mind, where it was not shown that it was incumbent on the parson to find the clerk⁽¹⁾; a prescription of having found straw for the body of the church, in discharge of tithe-hay⁽²⁾; of having time out of mind repaired the church, in discharge of the payment of all tithes⁽³⁾; or of having procured a rope for a bell, or paying a quit-rent to the lord of

⁽¹⁾ *Savel v. Wood*, Cro. El. 71. Moore, 908. 1 Leon, 94.

⁽²⁾ *Scory v. Baber*, Gwm. 163.

⁽³⁾ 1 Roll. Abr. 649.

the manor (¹), when urged as discharges from tithes in kind, have all been held invalid moduses. But had the parson been bound by custom to find the parish-clerk ; or had the straw been procured, and placed in the chancel, instead of the body of the church ; the prescription would have been beneficial to the parson, and therefore might have been good.

So a custom that the land-owner should take the best out of every ten lambs, and the tithe-owner the next best, is an invalid custom. — Richards, Chief Baron, having said, This is not a modus : it is, if any thing, a manner of paying tithes in kind, for it proposes to the parson to take one in ten ; but it is a departure from the legal course of rendering tithes. It is not more beneficial to the parson. On the contrary, there is no consideration for the custom moving to the tithe-owner, nor is there any provision made under the custom as stated for any lambs under or above the number of ten. (²)

Thirdly ; it must be something different from the thing compounded for.

Must be different from the thing compounded for.

Thus a modus, that tithe-milk ought to be paid by every tenth evening and morning's meal, in kind, from about Easter until November, in lieu

(¹) Gibs. Cod. 674.

255. Layng v. Yarborough,

(²) Hall v. Maltby, 6 Pr. R. 4 Pr. R. 383.

of all the tithe-milk of the year⁽¹⁾; the tenth shock of corn for all corn; a load of hay in discharge of all tithe-hay⁽²⁾; certain sheaves of corn for the tithe of the whole corn, are all void⁽³⁾; as the law will not suppose it possible, that the parson would *bond fide* have entered into a composition to receive less than his due in the same species of tithe; for it is evident a modus to take a part for the whole must ever be held a void custom.⁽⁴⁾

But rule only where things payable of common right,

This rule however only holds where tithes are payable of common right and not by custom. Hence a modus to pay a certain portion of fish taken in the sea, less than a tenth, and due by custom only, is a good modus.⁽⁵⁾ So a modus to pay tithe-cheese from May-day till Michaelmas, to be discharged of the whole tithe of the cows, has been held valid, as no tithe is due for cheese, except by custom, and the labour of milking and making into cheese is added, when nothing but the tithe of the milk is *de jure* tithable⁽⁶⁾;

and not rendered in any ulterior state.

Nor does the rule extend to cases where, though the compensation is of the same nature with the

⁽¹⁾ Brinklow v. Edmonds, Bunb. 307.

⁽²⁾ 2 Leon. R. 70.

⁽³⁾ 1 Roll. Abr. 651. Gibs. Cod. 675.

⁽⁴⁾ Hayter v. Stapleton, 2 Atk. R. 138.

⁽⁵⁾ Shepherd v. Penrose, 1 Lev. R. 179.

⁽⁶⁾ Ingolsby v. Johnson, Cro. El. 786. Austyn v. Lucas, Cro. El. 609.

thing compounded for, it is rendered in any ameliorated or ulterior state. Thus a modus whereby in consideration that the parishioner made the grass growing in a particular place, and then paid the tithe by way of discharge for the payment of the balks or hades (''); or that he has cut, dried, and shocked the corn, in lieu of the payment of tithe-hay the following year; have each been held good and valid moduses.

So where an immemorial custom was shown for the rector to take the eleventh mow or shock of wheat, consisting of six or nine sheaves, which the farmer used to put into shocks, and in case of bad weather, to open them to dry, and the eleventh cock of barley and oats, which was merely put into cocks without doing any thing farther, except in the case of wet weather opening the cocks and putting them up again; it was adjudged that the tithe-wheat, which is at common law tithable in the sheaf, was uniformly advanced to a further stage of labour by being put into shocks, by which it was better protected from the weather; and that this benefit, together with the additional labour by the farmer for the benefit of the rector, which the rector must otherwise take upon himself, constituted a good consideration for rendering the eleventh

(¹) Wood v. Symons, Het. R. 147.

instead of the tenth shock of wheat. But in the case of the barley and oats, where it was only put into cocks, the additional labour of casually opening them, in the event of wet weather, did not amount to an equivalent for the deduction claimed. The mere labour of ventilation was too uncertain and minute to warrant a departure from the common law right. It was a matter of accident whether any thing beyond what was required by the common law would be done, and the mere probability of extra trouble was not a sufficient consideration to warrant the custom. (')

Must not be a payment for one thing in discharge of another.

Fourthly ; a payment for one species of tithe will be no discharge for the payment of another. —

Thus a payment of the tenth sheaf of corn, the tenth cock of hay, the tenth fleece of wool, the seventh calf, and the parson to pay three halfpence ; and the eighth calf, if he had eight, and the parson to pay one penny *et sic usque ad decem* ; and if he had under the number of seven, to pay only a halfpenny for every one, and so after that rate for lambs and colts ; and that it was in satisfaction for all tithes of corn, hay, and cattle (2) ; one penny for every milch cow by the year, and for every other cow a half. —

(1) *Smyth v. Sambrook*,
1 M. and Sel. 66.

(2) *Ingolsby v. Johnson*,
Cro. El. 786.

penny *per annum*, in recompence and discharge of all tithes of cows, oxen, steers, and calves; a penny for every mare in discharge of all tithes of horses, mares, and colts ⁽¹⁾; one penny for every milch cow, in satisfaction for the tithe of milch kine, and beasts agisted ⁽²⁾; three half-pence for every cow having a calf, up to the number of five cows; for five cows having calves, one shilling and four-pence; for six cows having calves, two shillings and sixpence; for ten cows having calves, two shillings and eight-pence; for every cow having no calf, one penny; and for every milch cow, one penny; in satisfaction of all the tithes of cows, calves, and herbage and pasture of their lands within the parish ⁽³⁾, have been all held void moduses, upon the principle that a payment for one species of tithe can be no discharge for the payment of another.

In observing this rule, however, a distinction is to be regarded between a payment in discharge of a particular species of tithe, and a payment in discharge of the land. ⁽⁴⁾

Fifthly; the recompence must be in its nature as durable as the tithe discharged by it.

What modus is void with reference to uncertainty of duration.

⁽¹⁾ *Grysmen v. Lewes*, Cro. El. 446.

⁽²⁾ *Sherington v. Fleetwood*, Cro. El. 475.

⁽³⁾ *Morton v. Briggs*, Gwm. 561. 2 Lutw. R. 1037.

⁽⁴⁾ *Cowper v. Andrews*, Hob. R. 44. *Archbishop of York v. Duke of Newcastle*, Gwm. 585. *Sharpe v. Sharpe*, Noy's R. 148.

Tithe, we have seen, is an inheritance certain; hence it cannot be extinguished by a recompence that is not equally *durable*; and where this want of durability appears, no time nor usage can render a *modus* good.

Hence, a *modus* (for tithe-corn) to be paid by the inhabitants of a particular tenement, and the lands usually enjoyed therewith, is a void *modus*, because the tenement may fall down, or remain uninhabited, and then the recompence would fail. So where all the occupiers of farm-houses on the north side of a lane, with the land usually occupied therewith, had time out of mind paid three-pence at Michaelmas in each year for each cow; and all occupiers of farm-houses on the south side of the lane, with the lands usually occupied therewith, had time out of mind paid two-pence yearly for each cow, in lieu of tithe of milk; the *modus* was held bad, and an account directed. (1) Nevertheless, an annual payment of one penny by each occupier of lands in the parish for tithe of hay, has been recently held a good *modus*; the Master of the Rolls having said — “As to that for hay; on comparing the manner in which it is laid with that in *Bennet v. Read* (2), there is no distinction between them. In each case a custom is alleged in the parish for every

(1) *Carleton v. Brightwell*,
Gwm. 676. *Perry v. Soam*,
Cro. El. 139.

(2) 1 Anst. R. 322.

occupier to pay a particular sum in lieu of all tithe, the quantity is therefore immaterial. If that case is to be distinguished from *Travis v. Oxton* ⁽¹⁾, so is this in the same manner. If those cases are not to be distinguished, *Bennet v. Read*, being the more recent case, I ought to follow it; and upon that authority to hold this a good modus; but the vicar is entitled to an issue if he chooses. ⁽²⁾”

The distinction seems to be this: a payment by the inhabitants of certain houses is a bad modus, because houses may decay and not be rebuilt, or they may be uninhabited; and the modus depending on their existence may be objected to for want of certainty of *duration*; but as it is not likely a town or village will ever be wholly without inhabitants, a modus to be paid by the inhabitant householders within a town or village is sufficiently durable, and on that account may be good. ⁽³⁾

Sixthly, the modus must not be too large. Must not be too large.
For an agreement before the time of legal memory to pay in discharge of tithes a recompence which even now would amount to the value of the tithe, though its value has been so much enhanced since that very distant period,

⁽¹⁾ 1 Anst. R. 308.

⁽³⁾ *Bennet v. Read*, 1 Anst.

⁽²⁾ *Leyson v. Parsons*, 18 R. 329.

Ves. R. 174.

were preposterous, and must be rejected for its intrinsic improbability. Whenever a *modus* runs high, says lord Holt, it is a strong presumption that it is no *modus*.⁽¹⁾

What *modi* too large.

Hence, a customary payment of two shillings, payable by the occupiers of inclosed arable lands, in lieu of the tithes of every acre of such arable land when sown with corn and grain; one shilling and sixpence an acre for the tithes of grain reaped on common arable fields⁽²⁾; four shillings an acre for every acre of wheat, and two shillings for every acre of Lent corn reaped⁽³⁾; one shilling for every tenth fleece in lieu of the tithe of the ten fleeces⁽⁴⁾; twelve-pence for each milk cow (supposed to be above half the value of the milk at the time the *modus* probably commenced); sixpence for every calf killed and sold⁽⁵⁾; one shilling for every lamb⁽⁶⁾; four shillings for every ten lambs fattened, two shillings for every five lambs fattened, four-pence a piece for all under five, and for all above five and under ten, four-pence each, on the shearing-day, and three-pence a piece for all other

⁽¹⁾ *Startup v. Dodderidge*, 4 P. R. 383. *Wid. Torriano v. Legge*, Rayner, 521.

⁽²⁾ *Gale v. Carpenter*, Gwm. 945. 3 Wood's Dec. 173. ⁽⁵⁾ *Franklyn v. the Master &c. of St. Cross*, Bumb. R. 78.

⁽³⁾ *Hulse v. Monk*, Gwm. 300. *Leathes v. Newitt and others*, 4 P. R. 369.

⁽⁴⁾ *Layng v. Yarborough*, ⁽⁶⁾ *Drake v. Smith*, 1 Dan. Rep. 115.

lambs bred in the parish, in lieu of the tithes of such lambs⁽¹⁾; three-pence for every lamb⁽²⁾; four pounds ten shillings a year for a farm of the yearly value of thirty pounds⁽³⁾; two shillings in the pound on the improved yearly rent⁽⁴⁾; have all been dismissed by the court at once, as being *prima facie* rank, and consequently void moduses.

On the other hand, one shilling an acre for low meadows, and eight-pence an acre for high meadows, after an appeal to the House of Lords, have been held good moduses⁽⁵⁾, though in a few years afterwards it was said, that had the moduses been for tithe hay only, or the tithe arising on the land, one shilling would have been too rank.⁽⁶⁾ So a modus of one shilling for each day's math has been adjudged good, the Lord Chief Baron observing that in considering such a sort of modus, it was not fair to look at the mere value, and from comparative reasoning, to determine the validity of the custom, as agreements of this kind are not similar to other human transactions in matters of contract; and it is very probable that other

What moduses not too large.

(¹) Wood v. Harrison, 3 Wood's D. 250. Gwm. 970.

(²) Bishop of Chichester, 4 Gwm. 1516. Sed vid. Webb v. Giffard, Gwm. 708. and 1 Dan. R. 115. Bertie v. Beaumont, 2 Pr. 303. and C. B. Richards Judgment in Layng v. Yarborough, 4 Pr. R. 414.

(³) Kennedy v. Goodwin, Bunb. 301. 2 Wood's D. 305.

(⁴) Startup v. Dodderidge, Salk. 687.

(⁵) Pole v. Gardiner, 1 Bro. P. C. 214. Gwm. 601.

(⁶) Bate v. Hodges, Bunb. R. 125.

motives besides those of interest may have operated on the mind of one of the contracting parties, and have determined him to make a very beneficial bargain to the parson. (1)

Rankness of a modus a question of fact.

It seems generally allowed, that the rankness of a modus is a question of fact, and not of law. In cases of prescriptive or customary moduses, it is supposed that an original real composition was anciently made, which being lost by length of time, the immemorial usage is admitted as evidence to shew that it once did exist, and that from thence such usage was derived. Now, time of memory, as has been before observed, has been ascertained by the law to commence from the reign of Richard I. ; hence, as this real composition is supposed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the modus set up is so large and rank as that it beyond dispute exceeds the value of the tithes at that period, it is (in point of evidence) *felo de se*, and destroys itself. (2)

By whom triable when notoriously rank.

Thus there have been cases which it was said it would be perfectly useless and nugatory to send to a jury, and so notoriously rank from their internal evidence, that a court of

(1) Markham v. Huxley, | (2) 2 Bl. Com. 30.
Gwm. 1499.

equity will not direct an issue upon them, but overrule the claim without sending them to a trial at law. Upon this principle, in a late case, Chief Baron Macdonald, Baron Graham, and Baron Thomson, agreed in deciding that moduses of one shilling and sixpence and two shillings per acre for tithe hay were rank moduses, arguing that it was the province of the court to determine originally upon matters of fact of this kind, and to give the party the benefit of that opinion without sending him to a jury. On the other hand Baron Wood, differing *in toto* from the above decision, said, that rankness was merely a species of evidence to negative the probability of a modus, and as such ought to be submitted to a jury, in his opinion the proper and only constitutional tribunal for the trial of a prescriptive modus. It was also to be remarked, that in all appeals from the Court of Exchequer to the House of Lords, when the court had refused to grant an issue upon moduses, that house had uniformly reversed the decree of the court, and granted the issue. (*) On this principle, the validity of a modus of three-pence for every lamb, payable on Saint Mark's day, or as soon after as demanded, was sent to be considered by a jury, and the decree affirmed by the House of Lords. (†) Where a

(*) Heaton v. Cooke, 1 Wight R. 281.

(†) Webb v. Giffard, 4 Bro P. C. 212. Gwm. 708.

modus of ninepence an acre was claimed for every acre of marsh land in the parish, except when sown with corn, grain, flax, or planted with hops, Lord Hardwicke said, "I cannot determine this matter without a trial. The court certainly ought to support the rights of the church, and not to allow any modus, or customary payment, that by the rules of law is not to be supported. At the same time the court ought not, especially in cases of very extensive consequences, lightly to overturn and overthrow customary payments that have prevailed for a great tract of years, which is commonly called time out of mind, or beyond the memory of man. I am of opinion, that in these kind of cases, it is very fit to direct a trial, and more so, where it concerns the height of a modus in respect of the value of land, than any other." (1)

Rankness only evidence of the immemoriality of the payment.

The rankness is but evidence as to the immemoriality of the payment, and forms no objection in point of law to the modus, if it can be inferred that it has existed. "With regard to the cases," says Lord Eldon, "I never could persuade myself that one shilling per acre for all tithes was not in all probability a monstrous payment, and that the payments sent to be tried at law were not monstrous: but still the judges have thought even such payments ought to go to trial,

(1) Chapman v. Smith, 2 Ves. R. 506.

and verdicts under which, in many cases, even more than one shilling an acre has been claimed, have been confirmed. I am not at liberty, therefore, after what has passed in former cases, whatever may be my persuasion as to the truth of this case, to say this must not be tried. In *Fermor v. Lorraine*, I never had the least doubt that the *modus* was too rank, but the court sent it to an issue.” (1) So the same learned judge, upon a motion for a new trial, adds, “I cannot hold the language that has been held as to sending this to the prejudices of a jury. A jury is the constitutional tribunal of the country, and I am not at liberty to suppose they will be guided by prejudice. It is extremely well understood now, that the question whether rank or not is a question of fact (2), and the best way, in cases of this description, is to leave them to a jury, who from reference to the state of cultivation, or of luxury at the time, may have the best opportunities of ascertaining the fact.” (3)

Nevertheless, however moderately his lordship may have thought proper to exercise his judicial discretionary power, the right of exercising it has been strongly maintained by him. “I have no difficulty in saying, and, if it be important at

Right of a court of equity to decide without intervention of jury.

(1) *O'Connor v. Cooke*, 6 Ves. 672.

(2) *Ibid.* 8 Ves. 539.

(3) *Drake v. Smith*, 1 Dan. Rep. 115. Per Richards, C. B.

this period to say it, I desire it may be understood, that after now about forty years' experience in the profession, I take it to be quite clear that a court of equity, in cases of this sort, as well as with respect to all cases where matters of fact are in question, has a *right* itself to determine upon the fact *without* the intervention of a jury. If the evidence which is before a court of equity is satisfactory upon the fact, I never can admit that a court of equity is bound to send any such case to a jury." (1)

So in Lord Lonsdale's case Chief Baron Richards, in Michaelmas term eighteen hundred and seventeen, observed, that he knew no reason why juries should not be as honest in the cases as in all others; but as to the right of a court of equity to decide on matters of fact, "It is of the essence and constitution of equity to decide at once on facts, as juries do, except in one or two instances, as that of an heir at law disputing the validity of a will, and a rector suing for tithes." (2) As the law now stands, a court of equity should decide upon facts as well as upon law, if they have sufficient evidence of the facts to satisfy their minds. Whatever the law ought to be, whatever the law may be expected to be, I

(1) Bullen v. Michel, 2 Price R. 466.

(2) Mytton v. Harris, 3 Price

R. 25. Bullen v. Michel, 2 Price R. 423.

take it we are bound here by our oaths to decide according to the law as we find it; I have found it to be the law of England, as it now stands, and I shall abide by it until the legislature orders the contrary.” (1)

A distinction has been made relative to sending a farm modus, or a modus for a specific produce, to a jury. This distinction was introduced by Lord Hardwicke (2), and subscribed to by Chief Baron Macdonald, who said, that in a farm modus the court should be extremely cautious in deciding a question without the intervention of a jury, particularly where a doubt arises as to the fact of rankness, as the owner may have meant a bounty to the clergyman, or to pay for an exemption from tithes for the sake of improvement; nor should it be nice in judging of the value or the goodness of the bargain, where, by any probable circumstances, which policy or propriety may have dictated, there may have been a real agreement between the parties before time of memory. (3) Other motives than those of a pecuniary bargain might have influenced a particular proprietor to make a grant to the church, and the validity of a farm modus therefore is not to be tried by a comparison of value

Farm modus
triable by
jury.

(1) Per Richards, C. B. in *Layng v. Yarborough*, 4 Pr. R. 415.

(2) *Chapman v. Smith*, 2 Ves. 506.

(3) *Atkins v. Ld. Willoughby de Broke*, 2 Anst. 397.

with the whole tithe at any remote period. (1) Hence Baron Wood, in his judgment already referred to, states, that for the forty or fifty years last past he cannot find that either the Courts of Chancery or Exchequer have taken upon themselves to determine a farm modus to be bad upon the face of it on account of its largeness, but have thought it right to send it to a jury. (2)

Difference
between the
value of
things and
the value of
land.

A distinction prevails between a modus, the validity of which depends on the *value of things* before time of memory, and one which regards the *value of land* at that period. The inference from the magnitude of the payment in the former case is much stronger against the fact that it is immemorial than in any agreement to pay so much an acre, and *a fortiori* for a particular farm; for it is perfectly easy in almost any period of our history to ascertain what a lamb was worth, and therefore to conjecture upon what in any place parties would agree; but what is the value of land in a particular parish, and what therefore it is proper to give per acre, is a very complicated question. (3)

(1) White v. Lisle and others, 4. Madd. R. 224.

(2) Heaton v. Cooke, Wight R. 281.

(3) O'Connor v. Cooke, 6 Ves. R. 672.

In estimating these matters, the jury are not to take the mere quantum of the sum as decisive evidence of the rankness of a modus, but they must consider also whether it has been immemorially paid, notwithstanding its magnitude. ⁽¹⁾

In estimating duty of jury.

A modus may be discharged either by the removal, alteration, or destruction of the thing for which the modus was paid, or by not making payment of the consideration of the discharge, or by paying the tithes themselves.

How a modus may be discharged.

Thus, where the owner of a mill, of his own accord, without any cause or necessity, removes his mill to a new place, in this case the modus is lost. ⁽²⁾ If there is a modus to pay a buck, or doe, or a shoulder of a deer for all manner of tithes in a park ⁽³⁾; or ten shillings for the deer and herbage of a park, and not for all the park, in all cases where the park is disparked the prescription is gone, and if the land is cultivated with corn, tithes in kind must be paid. ⁽⁴⁾ In most cases, indeed, where the origin of a park is discoverable, the modus is defective, as the King's licence to impark is seldom so ancient

⁽¹⁾ O'Connor v. Cooke, 8 Ves. R. 539. | Cro. El. 467. Wats. Cl. L. 513.

⁽²⁾ 1 Roll. Abr. 652.

⁽⁴⁾ Degge, c. 16. 313.

⁽³⁾ Bedingfield v. Feak,

as the reign of Richard the First. So a prescription for a modus for hay or grass on so many acres of land is suspended, if the land is converted into a hop garden, or into tillage. But if the hop garden or tillage is not continued, and the land is relaid down for hay or grass, the modus revives; or if the modus is for the land, an alteration in the mode of using the land, does not affect the modus.⁽¹⁾ So, if there are several water-mills for which a modus of four shillings *per annum* is paid, the destruction of one of them does not affect the modus, and the four shillings are still payable⁽²⁾: or if there is a prescription, time out of mind, and the prescriber lets the land to farm, and the farmer pays tithes in kind, this does not destroy the prescription as to the lessor.⁽³⁾

non-pay-
ment of con-
sideration.

Again, the non-payment of the consideration, or the payment of tithes in kind for so long a period that the modus cannot be proved, will naturally destroy it, for custom and prescription may be lost as well as obtained by time.⁽⁴⁾ But a modern temporary interruption of ten or twenty years is not understood in this way, and will in no degree affect it⁽⁵⁾; neither will the unity of

⁽¹⁾ 2 Inst. 653.

⁽²⁾ Talbot v. May, 3 Atk. 17. Degge. c. 17. 316.

⁽³⁾ Monke v. Butler, 2 Roll. R. 176.

⁽⁴⁾ Com Dig. Tit. Præs. G. Wats. C. L. 512.

⁽⁵⁾ 2 Inst. 653. Nowell v. Hicks, Gwm. 1570. Wats. Cl. L. 512.

possession, that is, as we have seen, to have the fee-simple in the rectory, and likewise in the land, destroy a *modus decimandi*.⁽¹⁾

(¹) *Chambers v. Hanbury*, Moore R. 527. 1 Roll. Abr. 936.

CHAP. IV.

On Leases of Tithes.

As it was doubtful whether leases of tithes were valid,

power of making leases of tithes given by 5 G. 3. c. 17.

TITHES constituting, in many instances, part of the property of masters and fellows of colleges or halls, deans and chapters of churches, masters and brethren of hospitals, archbishops, bishops, and other sole spiritual corporations, &c. and it having been considered doubtful whether leases were valid of such tithes, at least where land or other corporeal hereditaments were not included in the lease, a power of making such leases, either with or without lands, was given by the 5 Geo. III. c. 17. But as by that statute the terms of some prior statutes are necessary to be observed, it may be advisable to take a brief review of those provisions in them which are still applicable in making such leases.

Effects of 32 Hen. VIII. c. 28.

By 32 Hen. VIII. c. 28. all corporations sole seised in fee-simple (who before that statute were unable to make leases for a longer period than their own time, without the concurrence of the necessary parties) may bind their successors by making leases for three lives or twenty-one years without any confirmation, provided the follow-

ing requisites specified by the statute are observed. ⁽¹⁾

First, the lease must be made by deed indented, ^{Its requisites-} and not by parol or deed-poll.

Secondly, it must be made to begin from the day of the making thereof.

Thirdly, if there be any old lease in being, it must be surrendered, or expired, or ended, within a year of the making of the lease, and the surrender must be absolute, and not conditional.

Fourthly, there must not be a double lease in being at one time, the one for years, and the other for lives; but it must be either forty-two years, or three lives.

Fifthly, it must not exceed three lives, or one-and-twenty years, from the day of the making of it, but it may be for a lesser term or fewer lives.

Sixthly, it must be of lands or tenements which have most commonly been letten to farm,

⁽¹⁾ 1 Inst. 44 b. Rex v. Chaloner, 1 Lev. R. 113. Acton and Pitcher's case, 1 Leon. R. 113. Bis v. Holt, 1 Sid. R. 158. Watkinson v. Man, Cro. El. 349. Ensden, and Denny's case, Palm. 106.

or occupied by the farmers thereof, for the most part of twenty years next before making the lease; so that if they have been let for eleven years out of the twenty next before the making of the new lease, either for life or at years, or at will, it is sufficient.

Seventhly, the most usual and customary rent must be reserved yearly on such lease, as has been paid for the lands within twenty years next before such lease made.

Effects of
1 Eliz. c. 19.

By 1 Eliz. c. 19. archbishops and bishops are rendered incapable of granting any leases for a longer period than three lives or twenty-one years, even with the confirmation of the proper persons, which they might have done as well before as after the thirty-second of king Henry VIII. (1)

This power of thus granting leases is not given them by this statute, which is wholly *disabling*, but by the common law. The conditions and limitations prescribed by the 1 Eliz. must be observed in the leases of bishops for twenty-one years, or three lives. Thus, if a bishop lets a new lease when the old lease will be ended within one year, this is good without confirmation, because the 32 Hen. VIII. enables him

(1) Bishop of Salisbury's case, 10 Rep. 60.

to do so ; but if he lets a new lease when more than one year remains of the old, in that case confirmation is necessary in order to bind the successor, at it was at common law, for this is not within the statute of the 32 Hen. VIII. (1); and, therefore, if not confirmed, could not be aided by it, and if confirmed, would not stand in need of its aid.

This statute being enacted for the purpose only of disabling *archbishops* and *bishops*, the 13 Eliz. c. 10. was made to extend to *all other* ecclesiastical persons whatever, *except* archbishops and bishops who were restrained by the first of Elizabeth, c. 19., which is but a private and particular statute, and must therefore be especially pleaded. (2) *

Hence, to recapitulate, sole corporations, such as archbishops and bishops, may, without confirmation, make leases under the 32 Hen. VIII. either for three lives or twenty-one years, which

What leases
archbishops
and bishops
may make.

(1) Fox v. Collier, Moore R. 108. Gibs. Cod. 735. 10 Rep. 60. Cro. Jac. 112. Elmore v. Geale, Moore R. 253. Bul. N. P. 222.

(2) Talentine v. Denton,

* The words, "*or any other, &c.*" coming after parson or vicar, who are of an inferior order, will not comprehend bishops who are of an order that is superior. Wood's Inst. L. E. 261.

must by *that* statute be within *one year* of the termination of the preceding lease, and begin *from the day of the making thereof*; and by 1 Eliz. c. 19. no confirmation will make good any bishop's lease exceeding that term. But, as the 1 Eliz. c. 19. makes the leases of bishops and archbishops only void other than for the term of twenty-one years, or three lives, *from such time as any lease shall begin*, leaving the time of the surrender of the first lease as at common law, those bishops' leases made according to the statute 1 Eliz., although *not* within one year of the expiration of the old lease, when confirmed by the dean and chapter, are still binding on the successor.

Of concurrent leases.

Such leases so made are called concurrent leases. But these concurrent leases cannot be made for life on a precedent lease for years, nor for years where there is a lease for life in being. ⁽¹⁾

What leases deans, chapters, prebendaries, &c. may make.

Deans and chapters, prebendaries, archdeacons, heads of colleges, and other ecclesiastical persons may make leases for twenty-one years, or any less number of years, or for three lives, according to the rules laid down in 13 Eliz. c. 10., and may grant concurrent leases *with* the necessary confirmations; but *they*, by the 18 Eliz.

⁽¹⁾ Marler v. Wright, Cro. El. 141. Degge, c. 10. 119.

c. 11., must be within *three* years of the termination of the former lease, and *without* confirmation must be within *one* year of such termination. (1)

Parsons and vicars are restrained by 13 Eliz. c. 10. from granting longer leases than twenty-one years, or three lives, (except in the case of houses), even with the consent of the patron and ordinary, and without such consent are utterly incapable of binding their successors at all. In all such leases, the regulations before specified must be complied with, and all bonds, covenants, and judgments tending to frustrate the provisions of the statutes 13 and 18 Elizabeth are void. *

What leases
parsons and
vicars may
make.

As these statutes were enacted for the benefit of successors, leases made contrary to their enactments are good against the lessors during their lives, that is, for the time of the person

(1) *Carter v. Claycoles*, 1 Leon. R. 306. *Degge*, c. 10. 119.

* Leases made by archbishops and bishops are to be confirmed by the dean and chapter, or deans and chapters, if there are several chapters: those made by deans are to be confirmed by the bishop and chapter; those made by prebendaries and archdeacons, by the bishop, dean, and chapter; those made by parsons and vicars, by their patrons and ordinaries; and those made by the incumbent of a donative, by the patron alone. *Degge*, c. 10. 120.

who was head of the corporation when the lease was made. ⁽¹⁾ But in the case of corporations aggregate, as deans and chapters, the lease is void immediately against the dean, where he makes the lease without the consent of the chapter; but if the dean and chapter make the lease without the necessary restrictions of 13 Eliz., it is still binding against the dean. ⁽²⁾

Statute
5 Geo. III.
c. 17.

Leases of
tithes by
ecclesiastical
persons de-
clared to be
good in law.

Such were the powers and restrictions created by the several statutes enumerated. Whatever liberty was granted by these statutes, and whatever restrictions were imposed by them, the same were rendered applicable to the case of leases of tithes by statute 5 Geo. III. c. 17. which enacts, that all leases for one, two, or three lives, or any term not exceeding twenty-one years, already made and granted, or which shall at any time be made or granted, of any tithes or other incorporeal hereditaments, solely and without any lands or corporeal hereditaments, by any archbishop or bishop, master and fellows, or other head and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and every other person and persons who are enabled by the several statutes now in being,

⁽¹⁾ 1 Inst. 45. a.

⁽²⁾ 1 Inst. 43. a. n. 1. (17 | v. Gregory, Cro. Car. 501. n. d.
Ed.) 1 Inst. 43. a. n. 4. Lloyd | Edwards v. Dick, 4 B. & Ald.
217.

or any of them, to make any lease or leases for one, two, or three life or lives, or any term or number of years not exceeding twenty-one years, of any lands, tenements, or other corporeal hereditaments, shall be and are hereby deemed and declared to be as good and effectual in law against such archbishop, &c. and other persons so granting the same, and their successors, as any leases made of any lands or other corporeal hereditaments now are by virtue of the statute of the 32 Hen. VIII., or any other statute now in being.

By sect. 3., in case the rent or rents reserved in or by any lease or leases made by any archbishop, &c. or any other persons so enabled to make leases, shall be behind or unpaid by the space of twenty-eight days next over or after any of the days whereon the same shall or may be reserved, then it may be lawful for such archbishop, &c. to bring an action or actions of debt against the lessee or lessees, their heirs, executors, administrators, or assigns, for recovering the rent or rents which shall be then due and in arrear, in such and the same manner as any landlord or lessor could or might do for the recovery of arrears of rent due on any lease for life or lives, or years.

Actions may be brought for the recovery of rents reserved and in arrear for leases for life or lives.

As tithes are things which lie merely in grant, all leases or grants of them must be

Leases must be by deed.

by deed, and no parol demise thereof, nor any written instrument, will be effectual to pass them to a stranger, though they may be sufficient to authorize the occupier to keep them by way of retainer. (1)

Covenant in a lease for years of tithes runs with the tithes.

A covenant in a lease for years of tithes, made by the lessee respecting them, runs with the tithes, and binds the assignee of the lessee, against whom an action consequently lies for the breach of such covenant.

Thus, where there was an action of covenant by a rector of a parish against the assignee of his lessee for years of his tithes, who had covenanted for himself, his executors and assigns, not to let any of the farmers of the parish have any part of the tithes without the plaintiff the lessor's consent; and the breach was, that the defendant, the assignee, after the premises came to him by assignment, let some farmers in the parish have part of the tithes without the plaintiff's consent; after verdict for the plaintiff, it was objected in arrest of judgment, that the action did not lie against the assignee, for it was

(1) *Keddington v. Bridgeman*, Bunb. R. 2. *Tanner v. Small*, Yelv. R. 95. *Het. R.* 121. *Adams v. Waller*, Gwm. 1204. *Anon*, Godb. R. 354. *Withy and Saunders' case*, 1 Leon. 23. *Nelson v. Woodward*, Cro. El. 188. 249. *Hawkes v. Brayfield*, Cro. Jac. 137. *Brewer v. Hill*, 2 Ant. R. 419. *Swadling v. Piers*, Cro. Jac. 619. 4 Bac. Abr. tit. Leases. E. 5. *Anon*. Per North Ch. J. *Freem. R.* 234.

a mere personal and collateral covenant binding the lessee only ; and that tithes were incorporeal, lying in grant, and therefore such a covenant could not run along with them, as it would with lands which lay in livery ; and that a rent could not be reserved out of them, for if a lease were made of them by deed for years, it was good by way of contract to have an action of debt against the lessee, but the lessor could not distrain ; and that the assignee of the tithes was not chargeable with the rent, and consequently the defendant could not be chargeable with breach of covenant in that case. But it was answered and resolved by the Court, that the action was maintainable against the assignee; for as to the objection that tithes were incorporeal, and therefore the assignee was not bound, they answered, that tithe was a tenth part of the profits of the land ; the profits of the land were the land itself ; tithes were tangible and visible ; might be put in view in an assize ; an ejectment lay for them ; a *præcipe quod reddat* lay of a portion of tithes, and they were realized by statute 32 H. VIII. c. 7. § 7. ; a warranty might be annexed to incorporeal inheritance, and that they had every property of an inheritance in land, except that they lie in grant, and not in livery. ⁽¹⁾

(¹) The Dean and Chapter of Windsor v. Gover, 2 Saund. | R. 304. a. (12) Bally v. Wells,
3 Wils. R. 25. Dyer, 85. a.

Of notice to
determine a
composition.

Where there is a composition or agreement by way of retainer with the occupier, if the duration of his term and interest is not fixed, the rector or vicar who made or has adopted that composition or agreement, cannot put an end to it without a notice for that purpose; and that notice must be given in analogy to the notice given in a holding of land; must be half a year's notice, which half year must expire with the year of the composition, and the notice must be to determine the whole, and not part of the composition. ⁽¹⁾ Thus, where a composition subsisted for tithes from year to year, such year commencing at Michaelmas, and a notice to determine the composition was given only one month before Michaelmas day, the judges were unanimously of opinion that the notice was insufficient ⁽²⁾: And notice served on the 29th of September to determine the compositions ending on the 25th of March, or at Michaelmas, to quit on the Lady-day following, is sufficient. ⁽²⁾

If the lessee of tithes for one year underlets

⁽¹⁾ Wyburn v. Tuck, 1 Bos. and Pul. R. 465. Bishop v. Chichester, Gwm. 1316. Morgan v. Church, 3 Campb. R. 73. Reynel v. Rogers, Bunb. R. 15. Doe d. Pitcher v. Donovan, 2 Campb. R. 78. Duke of Bedford v. Knightley, 7 T. R. 63.

⁽²⁾ Hewit v. Adams, 7 Bro. P. C. 64.

⁽²⁾ Doe d. Harrop v. Green, 4 Esp. N. P. C. 199. Doe d. Duke of Bedford v. Knightley, 7 T. R. 63.

them to the several occupiers of the land, no notice to determine the underletting need be given by another lessee of the same tithes for the following year. (1) Or where an occupier having been under a composition for his tithes, refuses to set out the tithes in kind, alleging that he is exempted by a modus, this disclaimer of the tithe-owner's title to tithe in kind, renders the proof of notice unnecessary, as a landlord may recover in ejectment without proving a notice to quit, where there is evidence that the tenant has disclaimed his landlord's title (2), and parol evidence of the defendant's denial of the plaintiff's right, is a sufficient notice of the determination of the composition. (3)

A parol agreement of the tithe owner with the occupiers for a composition, excuses them from the penalties given by the 2 & 3 Edw. VI. and also from costs, until notice given of the determination of the agreement. (4)

All compositions of this description are determined by the death of the incumbent, and no notice therefore can be necessary on the part of

Parol agree-
ment saves
penalties of
2 & 3 Edw. VI.

Composi-
tions deter-
mined by the
death of the
incumbent.

(1) Cox v. Brain, 3 Taunt. R. 95.

(2) Bower v. Major, 1 Brod. & Bing. R. 4. 3 Moore's R. 216. Throgmorton v. Whelpdale, Bull. N. P. 96. a.

(3) Bower v. Major, 1 Brod. & Bing. R. 4. Leech v. Bailey, 6 Price's Rep. 504.

(4) Breamer v. Thornton, Hardr. R. 203.

the successor. But where the successor adopts the composition, then it will amount to a confirmation, so far as to oblige him to give notice of his renouncing it, in which case the regular notice as specified is necessary. ⁽¹⁾

Of the apportionment that each incumbent is entitled to.

Where a rector agrees with the parishioners for so much a year for his tithes, to be paid at Michaelmas, if he dies during the year, the agreement determines by his death, and each tithe-owner is entitled only to the tithes accruing due in his own time. But if the successor adopts the composition, it then becomes a question what proportion of the composition, and with reference to what rate, the executors of the last incumbent are entitled to receive. The case of *Williams v. Powell* ⁽²⁾ decides that the successor is accountable to the executors for such a portion as the *value* of the tithes, if paid in kind, accruing due between the last composition received by the late incumbent, and his death, would have amounted to, and *not pro rata* according to the *time* elapsed before his death from the last payment; but in the case of *Aynsley v. Wordsworth*, Sir Thomas Plumer, then Vice-Chancellor, held that it was to be *pro rata* according to the *time*. ⁽³⁾

⁽¹⁾ *Brown v. Barlow*, Gwm. 1001. *Doe d. Martin v. Watts*, 2 Esp. R. 501.

⁽²⁾ 10 East. 269.

⁽³⁾ *Aynsley v. Wordsworth*, 2 Ves. and Bea. R. 331. Anon. Bunb. 294.

CHAP V.

On the different Remedies for the Recovery of Tithes.

SECTION I.

In the Ecclesiastical Court.

ONE remedy for tithes is by suit in the spiritual court, but such suit is liable to be checked by prohibitions from other superior courts, in case questions arise more particularly proper for the consideration of the common law courts, or where the rules of decision in the one are different from what they are in the other.

Suits in spiritual court checked by prohibition

Thus, where the want of jurisdiction of the spiritual court appears on the face of the proceedings⁽¹⁾, where the construction of an act of parliament comes in question, and the court proceeds to try contrary to the principles and course of the common law⁽²⁾, (as by allowing

Grounds of prohibition

(1) *Paxton v. Knight*, 1 Bur. R. 307. *Symes v. Symes*, 2 Bur. 813. *Carlake v. Mapledoram*, 2 T. R. 473.

(2) *Full v. Hutchins*, Cowp. R. 422. *Richardson v. Disborow*, 1 Vent. 291. *Leman v. Goulty*, 3 T. R. 3. *Bagnall*

v. Stokes, Cro. El. 88. *Mal-lary v. Marriot*, Cro. El. 667. *Gould v. Gapper*, 5 East. 345. *Gardner v. Booth*, 2 Salk. R. 548. *Gare v. Gapper*, 3 East. R. 472. *Shötter v. Friend*, 2 Salk. R. 547. *Cook v. Licence*, Ld. Raym. 346.

evidence, which the common law does not allow⁽¹⁾,) where there is a suit for tithes of things of which no tithes are of common right due or ought to be paid⁽²⁾, for tithes in specie where a personal tithe only is payable⁽³⁾, for tithes due by custom where the custom is denied⁽⁴⁾, for the right of carrying away tithes by a particular way, the right of way generally depending upon custom or usage⁽⁵⁾, for tithe of wood of the age of twenty years or upwards⁽⁶⁾, where a defendant, by his answer in the spiritual court, alleges that the trees are above twenty years growth, and produces an affidavit that that court has refused such plea⁽⁷⁾, if the spiritual court will not permit the tenant to plead to the right of the incumbency⁽⁸⁾, or allow such an agreement to bind an impropietor as at common law would bind him⁽⁹⁾, a prohibition lies.

Again, where there is any customary method of setting out tithe, or the validity of a modus

⁽¹⁾ *Breedon v. Gill*, *Ld. Raym. R.* 219.

⁽²⁾ *Seld. de Dec. c. 14. § 3.*
Cote v. Warner, *Gwm.* 272.
6 *Com. Dig. tit. Pro. G.* 8.

⁽³⁾ *Danderidge v. Johnson*,
Cro. Jac. 523.

⁽⁴⁾ *Anon. Hetley*, 13.

⁽⁵⁾ *Anon.* 1 *Bulst.* 67.

⁽⁶⁾ *Gwm.* 4. 5. *Rot. Parl.*
47. E. 111. No. 9. 1373. 50.

E. 3. No. 141. 1376.

⁽⁷⁾ *Dike v. Brown*, 2 *Ld.*
Raym. 835. *Boughton v.*
Hustler, *Gwm.* 951.

⁽⁸⁾ *Green v. Penilden*, *Cro.*
El. 228.

⁽⁹⁾ *Chave v. Calmel*, 3 *Bur.*
1873, *Gwm.* 926.

comes in question in a suit in the spiritual court for subtraction of tithe, a prohibition is granted⁽¹⁾, unless the defendant admits the modus, or permits that court to proceed to sentence, in which case it will be too late for a prohibition; the distinction being, that, after a sentence, there can be no prohibition *pro defectu triationis*, whereas it is never too late *pro defectu jurisdictionis*.⁽²⁾

On the other hand, in disputes between ecclesiastical persons or their servants, in all cases relative to the subtraction of tithes, and in ordinary cases between spiritual persons and laymen, where the right is not controverted, the spiritual court has jurisdiction, and may compel the payment of them.⁽³⁾ So where the right comes under discussion between two ecclesiastical persons, as between the parson and the vicar, in the same parish of tithes due of common right, there the spiritual court has cognizance of the matter, and will not be ousted of its jurisdiction.⁽⁴⁾ But if the right to certain tithes, or a portion of tithes, is controverted between two clergymen who came into their churches by several patrons,

Jurisdiction
of the spiri-
tual court.

⁽¹⁾ *Clarke v. Prowse*, Latch. 210. 2 Vol. Ld. Bacon's W. 536. Anon. 1 Vent. 32. 274. *French v. Trask*, 10 East, 348.

⁽²⁾ *Offley v. Whitehall*, Bunb. 17. *Darby v. Cosens*, 1 T. R. 552.

⁽³⁾ 2 Inst. 489, 490. Stat. 1 R. II. c. 13. Rot. Parl. No. 118. Gwm. 7. 1566.

⁽⁴⁾ *Hickes v. Froud*, Gwm. 267. *Drake v. Taylor*, 1 Stra. 87.

in that case it has no power to determine the right to the tithes, if they amount to a fourth part of the yearly value of the church.⁽¹⁾ Where, however, the dispute is between two parsons, to which of them the tithes belong, whether to the one by parochial right, or to the other as a portion belonging to his rectory by prescription, both claiming by presentation under the same title, so that the right of patronage does not enter into the question, it may be determined by a suit in the ecclesiastical court, and this suit is called a spoliation.⁽²⁾

So suits for the refusal to set out tithes⁽³⁾, for tithes after they are severed, if subtracted by the owner⁽⁴⁾, for disturbance in the way when carrying tithes from the field⁽⁵⁾, for a refusal to let the tithe-owner come by the usual way after they are set out, where the right of way is not in question⁽⁶⁾, whether they belong to the parson or the vicar⁽⁷⁾, by a parson against an impropiator, being a layman, whether they are great

⁽¹⁾ *Degge*, ch. 26. 371.
38 Hen. VI. 21. Stat. Cir-
cum. Agatin. 13 Ed. I. Stat. 4.
c. 1.

⁽²⁾ *Degge*, ch. 26. 369.
38 Hen. VI. 21.

⁽³⁾ *Gale v. Ewer*, 1 Com.
R. 22.

⁽⁴⁾ *Blackwell's case*, Cro.

El. 844. *Leigh v. Wood*, Cro.
El. 607.

⁽⁵⁾ *Halsey v. Halsey*, Gw. m.
469.

⁽⁶⁾ *Anon*, 1 Bulst. 108. ~~108~~ 109.

⁽⁷⁾ *Draughton v. Smith*, 1
Bulst. 157. *Savel and Woo* — 1
case, 1 Leon. 24.

or small tithes⁽¹⁾, for oblations and obventions, unless nothing is due for them by custom⁽²⁾, are all of ecclesiastical cognizance. But, in general, whenever the right is disputed, whether the tithe is due or not, it cannot be determined in the ecclesiastical court, but must come before the courts of common law, as such question affects the temporal inheritance, and the determination must bind the real property.⁽³⁾ So, where a modus is set up and denied⁽⁴⁾, fraud or covin complained of⁽⁵⁾, a deed insisted upon⁽⁶⁾, or any other matter properly triable at common law, or where the verdict of a jury is necessary, it cannot be decided by the ecclesiastical court.

By the statutes 27 Hen. VIII. c. 20., and 32 Hen. VIII. c. 7., on information made by the ordinary for contempt of the defendant in a cause, any of the king's council, or two justices of the peace, may attach the defendant, and commit him to the next county gaol, until he finds sureties to give obedience to the process, and perform the sentence of the ecclesiastical court. And by the stat. 2 & 3 Ed. VI. c. 13., if the

(1) 6 Com. Dig. tit. Prohibition, G. 6.

(2) 6 Com. Dig. tit. Pro. G. 11.

(3) 3 Bl. Com. 88.

(4) Blacket v. Finney, Gwm. 661. Bunb. 176. Salmon v.

Rake, Gwm. 736. Bunb. R. 176.

(5) Stebs, v. Goodlock, Moore, 913. Gwm. 152.

(6) Cheeseman v. Hoby, Willes R. 680.

defendant does not obey the sentence, the ecclesiastical judge may excommunicate him, and in case he continues so forty days after publication in the parish church where he dwells, may signify it to the Court of Chancery, and pray process against him. ⁽¹⁾

SECTION II.

In the Courts of Equity.

**Jurisdiction
of the Courts
of Chancery
and Exchequer.**

THE Court of Chancery has ever exercised an undoubted jurisdiction over tithes ⁽²⁾, and because they were always a part of the possessions of the Crown, the Court of Exchequer naturally claimed a jurisdiction over them, and, as appears from the earliest reports and records of law upon the subject, has uniformly exercised that jurisdiction—one reason probably that suits for tithes have been, and still are, most frequently brought in that court. ⁽³⁾

Another reason why the Court of Exchequer now has chiefly the cognizance of tithe suits, is

⁽²⁾ 3 Com. Dig. Tit. Dis. M. 4. Rex. v. Owen, 4 Bur. 2095.

⁽³⁾ Anon. 2 Freem. 27. Gwm. 527. Windham v. Norris, Gwm. 136.

⁽³⁾ Travis v. Oxton, Gwm. 1084. 1 Inst. 159. a. n. 4. Ed. 17.

the manifest ease and convenience of the suitors, whose rights so frequently depend for proof upon the records of the court deposited in its various offices, and particularly in the King's Remembrancer's Office, Treasurer's Remembrancer's Office, Augmentation Office, and Auditor's Office; these records being more familiarly known to the several persons in whose custody they are deposited. ⁽¹⁾

A bill in equity may be filed for the subtraction of tithes, however small the value of the tithes may be ⁽²⁾; though, where it appeared to the court that the defendant had paid all his tithes to the plaintiff, except for six calves, for each of which, by custom, only a halfpenny was due, this being so minute, the court declared the bill to be vexatious, and dismissed it. ⁽³⁾

Of a bill in equity for the subtraction of tithe.

As Courts of Equity never assist in recovering penalties, nor in compelling discoveries of forfeitures, the double or treble value of the tithes subtracted cannot here be enforced, and it is usual in bills to wave the penalty expressly, and pray an account of the single value of the tithes, though the accuracy of former times has been of

Treble value never given in courts of equity.

⁽¹⁾ Fowler's Pr. of Exch. 5. and 6.

⁽²⁾ Lewis v. Griffith, Gwm. 736. Anon, Bunb. 28.

⁽³⁾ Griffiths v. Williams, Gwm. 549.

late relaxed, and an express waiver is not now absolutely necessary. ⁽¹⁾

Parties to a bill in equity.

Where the bill is to establish a modus against the lessee of an impropriation, the owner of the impropriation must be made a party, as courts will not bind the inheritance of persons not before them ⁽²⁾; hence the vicar is a necessary party to a bill for tithes by the impropriate rector, against an occupier, when the defence made is that the tithes in question are payable to him. ⁽³⁾ In a bill for a portion of tithes in a neighbouring parish, the vicar of that parish must be a party ⁽⁴⁾, and a bill for tithes, by the bishop and sequestrator, during the incapacity of the incumbent, has been dismissed for want of making the incumbent a party. ⁽⁵⁾ So in general whenever a want of parties appears on the face of a bill, that deficiency is a cause of demurrer. ⁽⁶⁾

A sequestrator cannot bring a bill alone for tithes, as he is bailiff, accountable to the bishop, and has no interest ⁽⁷⁾, and a lessee of tithes by

⁽¹⁾ *Wools v. Walley*, 1 Anst. R. 100. Gwm. 1383. Anon. 1 Vern. R. 60. Gwm. 523.

⁽²⁾ *Glanvil v. Trelawney*, Bunb. 70.

⁽³⁾ *Daws v. Benn*, 1 Jac. and Walk. 513.

⁽⁴⁾ *Baily v. Worrall*, Bunb. 115.

⁽⁵⁾ *Bishop of London v. Nicholls*, Bunb. 141.

⁽⁶⁾ *Wych v. Meal*, 3 P. Wms. R. 310.

⁽⁷⁾ *Berwick v. Swanton*, Gwm. 537.

parol must make the impropiator a party ⁽¹⁾, although a bill by the lessee of a rectory for three lives, who had made a derivative lease for tithe in kind, to establish a custom may be brought, notwithstanding the tithes are out in lease, as such a bill prevents collusion between the lessees and occupiers. ⁽²⁾ A rector and vicar cannot join in one bill, and suggest different moduses, because the inheritances are several and divided. ⁽³⁾

It is sufficient to show a title to the rectory, Evidence. without proving the receipt of tithes ⁽⁴⁾, the right of which is incident to the right of the rectory ⁽⁵⁾; nor is it here necessary, as at law, to hold a parson or vicar to the proof of his admission, institution, and induction. ⁽⁶⁾ But a vicar must either show himself entitled by endowment, or give such evidence of long possession, that the court may presume the vicarage was lawfully endowed. ⁽⁷⁾ A lay impropiator must show in whom the fee is vested ⁽⁸⁾, and state generally that he is entitled

⁽¹⁾ Henning v. Willis, Gwm. 898. | 130. Stone v. Ludlowe, Hardr. 321.

⁽²⁾ The Archbishop of York v. Sir Miles Stapleton, Gwm. R. 772. | ⁽⁶⁾ Woodcock v. Smith, Bunb. 25.

⁽³⁾ Anon, Gwm. 472.

⁽⁴⁾ Charlton v. Charlton, Bunb. 325. | ⁽⁷⁾ Twiss v. Blount, Hardr. 328. Barsdale v. Smith, Cro. El. 633.

⁽⁵⁾ Button v. Honey, Hardr. 115. | ⁽⁸⁾ Penny v. Hoper. Bunb.

to the tithe⁽¹⁾, but need not set out in his bill a title under the crown, and derive it down, though, if he does set out such title, it must be proved as set forth⁽²⁾; and, in general, whatever is essential to the rights of a plaintiff, and necessarily within his knowledge, should be alleged positively and with precision.⁽³⁾

Evidence must be founded on some allegation on the record.

It is also most material in equity pleading, that all the evidence intended to be relied on at the hearing, should be founded on some allegation distinctly put on the record, of the fact which it is calculated to support, or otherwise it will not be admitted on the hearing. Thus proof of a declaration by the defendant that he would endeavour to prevent the tithe-owners from getting their tithes, was rejected because the plaintiff had not in his bill charged such declaration to have been made by the defendant.⁽⁴⁾

Of the answer to bill in equity.

The defendant, in his answer to a bill for tithes, should meet or traverse all the material parts of the bill, though it will be sufficient for him to set forth such a statement as will inform the plaintiff of the general nature of the case intended to be made.⁽⁵⁾

⁽¹⁾ Lowther v. Bolton, Gwm. 1120.

⁽²⁾ Leigh v. Maudsley, Gwm. 703. Bunb. R. 296.

⁽³⁾ Mitford on Pl. 33.

⁽⁴⁾ Hall v. Maltby, 6 Pr. R. 240.

⁽⁵⁾ Baker v. Athill, 2 Anst. R. 491. Ward v. Shepherd, 3 Price, 619.

The answer must be neither double, manifold, nor uncertain, as a court will not permit two different defences quite inconsistent, on the same record. Thus where a defence has been placed on the footing of a composition real, the ground cannot be shifted, and a modus relied on. (1) Greater latitude is allowed in laying moduses in answers than in bills, but they must nevertheless not require other evidence by way of explanation; hence an answer to a bill for tithes, setting up a modus without stating for what tithable articles the modus is laid, is a substantial omission and defect, which no evidence can supply. (2) On the other hand, if an exemption is pleaded, for lands as having belonged to a dissolved priory, and it is proved they belonged to a free chapel, as the defence is good in substance it will be sufficient. (3)

Must be consistent and certain.

Although the statute of limitations cannot be pleaded here, the defendant as to the tithe being in the nature of a receiver (4), yet length of time is of itself a sufficient ground to refuse an account, if the party entitled to the tithes had the legal estate, and was under no disability, for in this case, as in others where a

Statute of limitations cannot be pleaded.

(1) Ward v. Shepherd, 3 Price Rep. 608. Wolley v. Hadfield, 3 Price Rep. 210.

(2) Bourke v. Isaac, 2 Price Rep. 299.

(3) Ward v. Shepherd, 3 Price Rep. 620.

(4) Marston v. Cleypole, Gwm. 674. Dean and Chapter of Westminster v. Sir T. Cross Bunb. R. 60.

person is apprized of his right, and does not assert it in proper time, he loses the right. ⁽¹⁾ Hence the court have dismissed, with costs, a bill seeking an account for tithes accrued more than six years before the filing of the bill. ⁽²⁾

Where a
modus
pleaded.

Where a modus is pleaded, the defendant must in all cases set out the quantity and value of the tithe, as he may die before they go to an examination, and the tithes lying only in the personal knowledge of the party, there would be no means of getting at the particulars ⁽³⁾; but where the plaintiff insists on a modus, though the modus be not proved in the manner in which it is set out in the bill, yet if the defendant admits that there is a modus, and the difference between him and the plaintiff is only as to the extent of it, the court will direct an issue at law to try how far it does extend, with liberty for the judge to indorse the *postea*. ⁽⁴⁾ If the plea is that the defendant had annually compounded with the plaintiff in lieu of tithes, it is not necessary to set out the time, when, or place where the agreement was made, for in a plea of setting out tithes there is no obligation to state when or where they have been

In equity no
venue is ne-
cessary.

⁽¹⁾ Monoux v. Shish, Gwm. 1582. Mede v. Norbury, 2 Pr. R. 366.

⁽²⁾ Garrard v. Shollar, Gwm. 1045. 3 Wood's Dec. 415.

⁽³⁾ Gumley v. Fontleroy, Bunb. 60.

⁽⁴⁾ Laithes v. Christian, Bunb. 340.

set out, and in general in Chancery pleadings no venue is necessary. ⁽¹⁾

An inaccuracy in an answer in stating the defence may generally be remedied by an endorsement on the *postea*, as considerable indulgence is shown in setting forth the defence; though the defendant is not to lie by in his answer, and give a blind description which the plaintiff cannot meet, but must use a fair and reasonable precision in the description of the lands covered by the *modus*. ⁽²⁾ Where several defences which are consistent are insisted upon, and a general exemption is undertaken to be proved, if that fails, the defendant cannot have the benefit of the other point. ⁽³⁾ So if different *moduses* for the tithes of different articles are insisted upon in an answer, they must be pleaded specially, as one *modus* cannot be pleaded distributively for the tithes of different things. ⁽⁴⁾

Inaccuracy
in answer
how re-
medied.

In laying a *modus* as a defence, it is not necessary to state exactly the number of acres, the object being simply to ascertain the land; if that object is attained by other means, the end

In describing
a *modus* what
certainty
sufficient.

⁽¹⁾ Mytton v. Harris, Wight. R. 111.

⁽²⁾ Wood v. Wray, 3 Anstr. 838. Gillebrand v. Scotson, 1 Daniel's Rep. 27.

⁽³⁾ Leigh v. Maudsley, Bunb. 297.

⁽⁴⁾ Turton v. Clayton, Bunb. 80.

is answered ⁽¹⁾, nor will a variation by the witnesses in the description of the land vitiate modus, provided they agree in pointing out the particular land covered by it, which is known to them, and capable of being described. ⁽²⁾ Thus in establishing a modus for ancient orchards, the quantities and boundaries of the orchards need not be stated; the name of an orchard is in the nature of the description of the thing, and the mere inspection will help to ascertain what is an ancient orchard. ⁽³⁾ A modus indeed for every garden and orchard, in lieu and full satisfaction of the tithes of all tithable matters arising therefrom, without stating them to be ancient gardens and orchards, has been recently decided to have been described with sufficient accuracy. ⁽⁴⁾

Nevertheless, in claiming an exemption by reason of a modus, there must be some description of the estate to which it applies, so that it may appear with certainty what the lands are in respect of which the exemption is claimed; as if it be an ancient estate it must be named ⁽⁵⁾, or when the land is only a part of a large portion covered by a general modus, it is insuffi-

⁽¹⁾ *Vyse v. Duntze*, Gwm. 1124.

⁽²⁾ *Markham v. Huxley*, Gwm. 1499.

⁽³⁾ *Scott v. Allgood*, Gwm. 1371. *Prevost v. Bennett*, 2 Price Rep. 272.

⁽⁴⁾ *Blackburn v. Jepson*, 17 Ves. 473. Bunb. R. 57.

⁽⁵⁾ *Wood v. Wray*, 3 Anstr. R. 838. *Croft v. Ayer and Bailey*, Gwm. 1325. *Wolley v. Hadfield*, 3 Pr. R. 210.

ent to describe the particular part only, but the whole of the land over which the modus extends must be pointed out ; for notwithstanding so much exactness of description is not necessary in an answer as would be required in a bill, yet it must necessarily state something by way of description of the particular lands claiming to be covered by the modus set up. ⁽¹⁾ So it is bad if the prescription as laid is larger than that proved by the evidence ⁽²⁾ ; and moduses introduced by stating that they are payable by the occupiers in lieu of tithes, within and throughout the parish (except the occupiers of several other farms and lands) not otherwise described than by their names, are ill laid for uncertainty. ⁽³⁾

So, in establishing a farm modus, setting out the abutments of the farm, and stating that the modus had been immemorially paid, without expressly calling it an ancient farm, or using any precise form of words, has been held sufficient. ⁽⁴⁾ A bill for establishing a modus requires greater accuracy than an answer. Thus a bill to establish a modus for every ancient farm, but not setting out the abutments of each, was dismissed.

In establishing a farm modus, no precise form of words necessary.

⁽¹⁾ Per Richards, C.B. *Gillebrand v. Scotson*, 1 Daniells R. 27.

⁽²⁾ *Driffild v. Orrell*, 6 Pr. R. 329.

⁽³⁾ *Wright v. Southwood and others*, 5 Pr. R. 607.

⁽⁴⁾ *Lord Stawell v. Atkins*, 2 Anst. 564.

sed, although it stated that the whole parish consisted of ancient farms. ⁽¹⁾ Yet if it appears that a pecuniary payment has been made for any sort of tithe, the court will help an imperfection in the manner of setting out the modus, and put an available sense upon the words. ⁽²⁾ And in a bill to establish a contributory modus, all the persons liable to the contribution need not be made parties. ⁽³⁾ So where a modus is set up as a defence to a bill for tithes, and the modus is incorrectly laid ⁽⁴⁾, or where it appears from the evidence in the cause that there is probably a good ground for opposing the plaintiff's claim, though the defendant has mistaken it, the court will permit him to amend his answer. ⁽⁵⁾ In general, however, in insisting on a parochial modus, it is advisable to state to whom it has been paid, and the particulars of those lands intended to be covered by it. ⁽⁶⁾ And a modus of two pounds eight shillings and a penny for certain tithes within a township, the occupier of each farm or tenement, within the said township respectively, paying his rateable proportion is bad for uncertainty, even in an answer, being both defective in form and substance; for it

⁽¹⁾ *Scott v. Allgood*, 1 Anst. 16.

⁽²⁾ *Mallock v. Browse*, Gwm. 905.

⁽³⁾ *Scarr v. Trinity College*, 3 Anstr. R. 768.

⁽⁴⁾ *Prevost v. Bennett*, 1 Price R. 236.

⁽⁵⁾ *Phillips v. Gwynne*, East. T. in Exch. 1779. *Maggridge v. Hodgson*, 2 Anst. R. 443.

⁽⁶⁾ *Coggan v. Ld. Lonsdale*, Gwm. 1404.

neither states by whom it is payable, nor the respective contributions of each individual towards making up the amount within themselves, nor to whom the owner of the tithe was to resort for his remedy in case the payments were resisted. (1) It may be observed, also, that where a party appears to have failed in establishing a *modus* by mismanaging the suit, a decree may be made without prejudice to the right, as it is consonant to practice to add a declaration to that effect, in order to prevent obscurity and future difficulty. (2)

It was formerly supposed, and indeed there are many old cases to support the doctrine, that in an answer to a bill for tithes, it was absolutely necessary to express the day of payment of a *modus* insisted upon. (3) Subsequent decisions have overruled this doctrine, and it has been thought too nice to require the proof of a particular day. (4) Indeed the court has established a *modus*, though proved to be payable on a different day than that stated in the bill, and a

Day of payment need not be stated.

(1) *Wolley v. Hadfield*, 3 Pr. Rep. 210.

(2) *Lake v. Skinner*, 1 Jac. and Walk. R. 21. *Ferrers v. Pellatt*, 4 Wood's D. 334. *Salt v. Swaine*, 3 Wood's D. 207.

(3) *Goddard v. Keeble*, Bunb. R. 105. *Pemberton v.*

Sparrow, Bunb. R. 105. *Phillips v. Symes*, Bunb. R. 171. *Goodwin v. Wortley*, Gwm. 715.

(4) *Richards v. Evans*, 1 Ves. 40. *Goddard v. Keble*, Bunb. R. 105. Gwm. 631.

defendant declining an issue in such a case was allowed his costs. ⁽¹⁾

May be proved by depositions.

Where no day of payment was alleged in an answer to a bill for tithes, the defendant was permitted to prove the day by depositions, and thus to supply the court with that evidence which might enable them to direct an issue. ⁽²⁾ In this case a distinction was taken, that though no day for the payment of a modus was laid in an answer, the day might be supplied by the evidence, so as to be a foundation for the court to direct an issue, but, in a cross bill to establish a modus, the day must be expressly alleged; and it should also be stated by whom ⁽³⁾, to whom ⁽⁴⁾, and for what tithes ⁽⁵⁾ the modus is payable.

But must be alleged in a cross bill to establish a modus.

If lands insufficiently described, plaintiff should except to the answer.

And in general, if the lands for which an exemption from tithe is claimed are not sufficiently described, the plaintiff should except to the answer of the defendant, and obtain a more particular statement, so as to enable him to meet the defence by evidence; but if he does not do so, he waves his objection, and cannot turn

⁽¹⁾ *Anderton v. Davies*, Gwm. 1268.

⁽²⁾ *Gibb v. Goodman*, Bunb. 328.

⁽³⁾ *Cart v. Ball*, 1 Vez. 3.

⁽⁴⁾ *Coggan v. Lord Lonsdale*, Gwm. 1404.

⁽⁵⁾ *Bourke v. Isaac*, 2 Price Rep. 299. Gwm. 1404.

the defendant round upon that point at the hearing. ⁽¹⁾

Where a decree for costs has been general, Costs. one defendant, who has survived his co-defendants, cannot procure an order of court that the costs should be apportioned, so as to relieve the survivor from the effect of such decree. ⁽²⁾

SECTION III.

In the Courts of Common Law.

THERE are various modes in which the temporal courts exercise their jurisdiction over tithes. Jurisdiction
of the courts
of common
law.

First, the courts of Westminster-hall, having a general superintendence over all other courts, will grant a prohibition to stay proceedings of an inferior court, either *pro defectu jurisdictionis*, *pro defectu triationis*, or for proceeding as the law of the land does not warrant; and if the judges or parties proceed notwithstanding the prohibition, an attachment may be issued, or an

⁽¹⁾ Foxcroft v. Paris, Gwm. 1529. | ⁽²⁾ Michelv. Bullen, 6 Price R. 87.

action upon the case brought against them.⁽¹⁾ It is in the discretion of the court to grant or to deny the writ of prohibition, as may appear to them according to the truth of the surmise or otherwise⁽²⁾; and this writ immediately prohibits the court from holding plea, and the parties from proceeding on matters where the court has no jurisdiction, as well after judgment and execution as before.⁽³⁾

Mode of
proceedings
in prohibi-
tion.

In obtaining, prosecuting, and defending prohibitions, the party aggrieved in the court below applies to the superior court, setting forth, in a suggestion upon record, the nature and cause of his complaint; upon which, if the matter alleged appears to the court to be sufficient, the writ of prohibition immediately issues, commanding the judge not to hold, and the party not to prosecute, the plea. But sometimes the point may be too nice and doubtful to be decided merely upon a motion; and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to declare in prohibition, that is, to prosecute an action by filing a declaration against the other, upon a supposition or fiction (which is not traversable),

⁽¹⁾ Bul. N.P. 218. Wood's Inst. L. E. 570.

⁽²⁾ Parish of Aston v. Castlebrimidge Chapel, Hob. R. 66. Sergeant Morton's case, 1 Sid.

R. 65. 1 Keb. R. 190. Het. R. 48.

⁽³⁾ 2 Inst. 602. Leman v. Goulty, 3 T. R. 3.

that he has proceeded in the suit below, notwithstanding the writ of prohibition ; and if, upon demurrer and argument, the court shall finally be of opinion that the matter suggested is a good and sufficient ground of prohibition in point of law, the judgment with nominal damages shall be given for the party complaining, and the defendant, and also the inferior court, shall be prohibited from proceeding any further.

On the other hand, if the superior court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for the prohibition in the court above ; and a writ of consultation shall be awarded, so called, because, upon deliberation and consultation had, the judges find the prohibition to be ill founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined in the inferior court ; and, even in ordinary cases, the writ of prohibition is not absolutely final and conclusive ; for though the ground be a proper one in point of law for granting the prohibition, yet if the fact that gave rise to it be afterwards falsified, the cause shall be remanded to the prior jurisdiction. ⁽¹⁾

(¹) 3 Bl. Com. 113. 114. | 136. a. l. Vid. Degge, c. 26.
Croucher v. Collins, Saund. | 387.

Secondly, at common law, no action would lie for the subtraction of tithes, the remedy being only in the spiritual courts.⁽¹⁾ But by the statute 32 Hen. VIII. c. 7. it is enacted, that any persons having an estate of inheritance, freehold term or interest in tithes, and being disseised or otherwise kept or put out of possession thereof, shall have such remedy in the temporal courts for recovering the same, as the case may require, in like manner as they may for lands, tenements, and other hereditaments. By force of this statute, tithes have at present all the incidents belonging to temporal inheritances⁽²⁾; when in the hands of laymen, they are accounted assets; husbands are tenants by courtesy, and wives endowed of them, and they have other incidents belonging to temporal inheritances.⁽³⁾

The remedies by action on the statute 2 and 3 Edward. VI c. 13. have been in some degree already stated in a preceding chapter. The usual mode of proceeding on that statute is by action of debt, which may be brought in any of the king's courts, for predial tithes, such as are capable of being set out, *both great and small*, at the suit of the party grieved.⁽⁴⁾ Hence debt

⁽¹⁾ Holden v. Smallbrooke, Vaugh. R. 195. Bish. of Winchester's case, 2 Rep. 44.

⁽²⁾ Selw. N.P. 1189.

⁽³⁾ 1 Inst. 159. a.

⁽⁴⁾ Per Macdonald, C. B. in Scarr. v. Trin. Coll. 3 Anstr. R. 760. 9 Vin. Abr. Tit. Dis. G. 6. Beadle v. Sherman, Cro. El. 608. 2 Inst. 650.

for not setting forth tithes may be brought by the rector (¹), his lessee or lessees (²), by an impropriator or his lessee, though a layman (³), by a person farming the tithes of the rectory and the vicarage, where both titles, and all or part of the tithes of the rectory and the vicarage are united in him (⁴), by tenants in common, who should join as plaintiffs (⁵), by executors, though not against them (⁶), and by any person entitled to the tithes at the time of severance, at which period the tithe-owner's right immediately accrues.

The proper form of action for the non-feazance, or not carrying away tithes, is by an action on the case, and trespass cannot be supported. (⁷) Where there is a composition in lieu of tithes an action for debt or *assumpsit* is sustainable, and on a lease for tithes ejectment will also lie. (⁸)

Action for
not carrying
away tithes.

(¹) *Phillips v. Kettle*, Hard. 173.

(²) *Champernon v. Hill*, Cro. Jac. 68. *Dagg v. Penkevon*, Cro. Jac. 70.

(³) 3 Com. Dig. Tit. Dis. M. 11.

(⁴) *Day v. Peckwell*, Moore, 915.

(⁵) *Cole v. Bunbury*, 1 Sid. 48. *Greenwood's case*, Clayt. 28.

(⁶) *Mr. J. Moreton's case*,

1 Vent. 30. *Holl. v. Bradford*, 1 Sid. 88. *Weekes v. Trussel*, 1 Sid. 181. *Moreton v. Hopkins*, 2 Keb. 502. Sed vid. contra, anon, 1 Vern. R. 60.

(⁷) *Williams v. Lagnier*, 8 T. R. 72. *Shapcott v. Muggford, Ld.* Raym. R. 187.

(⁸) *Dean and Chapter of Windsor v. Gover*, 2 Saund. R. 304. (¹¹) *Baldwin v. Wine*, Cro. Car. 301. *Camell v. Clavering, Ld.* Raym. R. 789.

Proceedings
on the part
of the plain-
tiff on the
statute
2 & 3 Ed. VI.

A plaintiff in an action on the statute of 2 & 3 Edw. VI. c. 13., for not setting out tithe, must prove himself entitled to the tithe, the taking away by the defendant, and the value⁽¹⁾; but he need not make any special title to the tithes, or show any deed to maintain his right to them. It is sufficient to allege generally that he is rector, proprietor, farmer, or portionist, without specifying by what title; for this is a personal action, grounded merely upon a contempt against the statute in not setting forth the tithes, and not for the recovery of them, although the title to the tithe may come in question⁽²⁾; and if the plaintiff claims as parson, and the title is in question, he must prove his ordination by the bishop, his institution and induction.⁽³⁾ Unless the contrary is shown, the court will presume that he has subscribed to the declaration in the Act of Uniformity in the presence of the bishop, &c. and read the thirty-nine articles within two months, and declared his assent to them⁽⁴⁾; for where an act is required to be done by any person, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirm-

(¹) Bul. N. P. 188.

(²) 2 Sel. N. P. 1210. Pel-
low v. Kingsford, 1 Vent. 126.
Mayle v. Ewer, Cro. Jac. 362.
Babington v. Matthews, Bulst.
328. Champerton v. Hill,

Yelv. 63. Sanders v. Sand-
ford, Gwm. 298.

(³) Bul. N. P. 188 b. Peak's
Ev. 468.

(⁴) Powel v. Milburn, 3 Wils.
355. 2 Bl. R. 851.

ative, and throws the burthen of proving the contrary, that is, in such case of proving a negative, on the other side. ⁽¹⁾ Fifteen years possession is *prima facie* evidence of a regular induction, and the payment of tithes by a defendant is alone sufficient evidence of a plaintiff's title. ⁽²⁾ It is not necessary for a plaintiff to show what estate the defendant has in the land, or by what title he occupies, a general allegation that he is occupier being sufficient ⁽³⁾; nor need he express in his declaration the different kinds of grain ⁽⁴⁾, or the quantity or loads of corn or hay carried away ⁽⁵⁾, or that the statute was passed on the second or the fourth of November in the 2 & 3 Edw. VI. &c. ⁽⁶⁾; though the time and place when and where the article was carried away ⁽⁷⁾, and the value of the whole tithe subtracted, should be alleged. ⁽⁸⁾ Where the declaration only stated that tithe had been yielded and paid forty years before the statute, and there was no averment that

⁽¹⁾ By Lord Ellenborough in *Williams v. East India Company*, 3 East, 199. *Monke v. Butler*, 1 Roll. Rep. 83.

⁽²⁾ *Berryman v. Wise*, 4 T. R. 366. *Bevan v. Williams*, 3 T. R. 635. *Chapman v. Beard*, 3 Anst. 942. *Gwm.* 1482. *Harris v. Adge*, *Gwm.* 560. *Radford v. M'Intosh*, 3 T. R. 635. *Per Buller J.* 4 T. R. 367.

⁽³⁾ *March's R.* 21.

⁽⁴⁾ 2 Inst. 650. *Beadles v. Sherman*, Cro. El. 613.

⁽⁵⁾ *Sanders v. Sandford*, Cro. Jac. 487.

⁽⁶⁾ *Rann v. Green*, Cowp. R. 474. *Langley v. Haynes*, Moore, R. 302. *Owen v. Evans*, 2 Keb. 34.

⁽⁷⁾ *Moyle v. Ewer*, Cro. Car. 361.

⁽⁸⁾ Cro. Jac. 437.

tithes were payable, nor evidence of their having been ever paid at all, it was held that the plaintiff could not recover ⁽¹⁾; but had it stated that the tithes were, within forty years next before the statute, of right yielded and payable, and yielded and paid, evidence that the land had always been remembered to be in pasture, and had never within living memory paid any tithe, is not sufficient to defeat the action ⁽²⁾; so where it was stated that the tithes were granted, yielded, and paid, and were of right, due and payable, it was held the plaintiff need not prove that the article was cultivated on the land before the making of the statute, but it lies on the defendant to prove that it was not. ⁽³⁾ The declaration should show that the defendant made no agreement with the plaintiff for the tithe before he carried it away ⁽⁴⁾, and that the defendant was one of the king's subjects at the time of subtraction, unless it alleges that he was occupier of the land at that period, in which case it will be inferred that he was one of the king's subjects. ⁽⁵⁾ It has been stated that an action on this statute lies only for predial tithes: hence, where the plaintiff declared as well for predial tithes as for tithes of lambs and

⁽¹⁾ Lord Mansfield v. Clarke, 5 T. R. 264. n. a.

⁽²⁾ Mitchell v. Walker, 5 T. R. 260.

⁽³⁾ Hallewell v. Trappes, 2 Bos. & Pul. N. R. 173.

⁽⁴⁾ Dagg v. Penkevon, Cro. Car. 70. Alston v. Buscough, Carth. R. 304.

⁽⁵⁾ Kipping v. Swayne, Cro. Jac. 324. Phillips v. Kettle, Hard. 173.

wool, the jury upon the trial finding for all, as well for those that would, as those that would not sustain an action, an exception being taken after verdict, judgment was arrested. ⁽¹⁾ It is sufficient to state the single value of the tithes, though, where the treble value is set forth, a mistake in computing it will not vitiate ⁽²⁾, for there is a difference when an action is grounded upon a specialty, or upon a contract for a sum certain, or upon a statute which gives a certain sum for a penalty, which must not be varied from: but when the demand is of an uncertain sum, and the recovery not according to the demand in the declaration, though according to the verdict, the variation from the just valuation is immaterial. ⁽³⁾ Where there has been any agreement for a composition, the plaintiff, if he sue for not setting out tithes in kind, must show such composition to have been discharged by six months regular notice expiring at the end of the year, as already stated. ⁽⁴⁾ If he sues as a lay improPRIATOR, and his title has never been acknowledged, as by the payment of rent or otherwise, it is not necessary to show that the rectory originally belonged to one of the dissolved monasteries, and was granted by the crown to those under whom he claims;

⁽¹⁾ *Pain v. Nichols*, 1 Brownl. 35. Sel. N. P. 1192. | Cro. Jac. 498. More's case, Cro. El. 22.

⁽²⁾ Sel. N. P. 1210.

⁽⁴⁾ *Wyburn v. Tuck*, 1 Bos.

⁽³⁾ *Pemberton v. Shelton*, & Pul. 458.

but length of possession, and old deeds conveying tithes, will be sufficient evidence of title. ⁽¹⁾

Proceedings
on the part
of the de-
fendant in
an action on
the statute
2 & 3 Ed. VI.

The general issue in this action is *nil debet* ⁽¹⁾, but not guilty has been held a good plea. ⁽²⁾

In order to justify himself, the defendant may prove that he duly set forth his tithes, and did not carry them away, or that a stranger carried them away; that the parson came in by simony, or other matter, that makes his presentation, institution, or induction void ⁽⁴⁾; but where the occupier of land has entered into an agreement for a composition of tithes, he cannot then set up as a defence to an action on such agreement that the incumbent was simoniacally presented ⁽⁵⁾; and proof of the defendant's former acknowledgment of the plaintiff's title to the tithes, is sufficient evidence as against the defendant a wrong doer. ⁽⁶⁾ So if a defendant pays money into court in an action brought against him on this statute, he cannot object to the plaintiff's

⁽¹⁾ Selwin v. Baldy, Bul. N. P. 188. Peake's Ev. 468. 469.

⁽²⁾ Bawtrey v. Isted, Hob. 218. Bul. N. P. 188 a. 2 Inst. 651.

⁽³⁾ Johns v. Carne, Cro. El. 621. Wortley v. Herpingham, Cro. El. 766. Cham-

pernon v. Hill, Moore, 914. Bastard v. Hancock, Carth. 361.

⁽⁴⁾ Degge, c. 26. 403.

⁽⁵⁾ Brooksby v. Watts, 2 Marsh. R. 38,

⁽⁶⁾ Bevan v. Williams, 3 T. R. 635. Per Buller J. in Ber-ryman v. Wise, 4 T. R. 366.

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title, for he thereby admits the plaintiff's right generally, and reduces the cause to a mere question of the amount of damages. ⁽¹⁾ If there are two plaintiffs, and if the defendant on a plea of *nil debet* proves at the trial that he made an agreement with one of them ⁽²⁾, or that another person had the right to the tithes, to whom he has paid them, or compounded for them, it is sufficient. ⁽³⁾

The statute of limitations could not be pleaded in bar to an action on this statute. ⁽⁴⁾ But by statute 53 Geo. III. c. 127. § 5. no action shall be brought for the recovery of any penalty for the not setting out tithes, nor any suit instituted in any court of equity, or in any ecclesiastical court, to recover the value of any tithes, unless such action shall be brought, or such suit commenced, within six years from the time when such tithes became due.

Statute of
limitations.
53 Geo. III.
c. 127. § 5.

Thirdly, by statute 7 & 8 W. III. c. 6. a summary method of proceeding before two justices of the peace is given for the more easy and effectual recovery of small tithes under the value of forty shillings, which value, by the 53 Geo. III. c. 127. § 4., is extended to any sum not exceed-

Recovery of
tithes not
exceeding
ten pounds.

⁽¹⁾ Broadhurst v. Baldwin,
4 Price's Rep. 58.

⁽²⁾ Degge, c. 26. 403.

⁽³⁾ Bohun on Tithes, 435.

⁽⁴⁾ Marston v. Cleypole,
Bunb. 213. Talory v. Jack-
son, Cro. Car. 513.

ing ten pounds, and includes all manner of tithes *great* and small.

Tithes, not exceeding the value of ten pounds, recoverable before two justices of the peace.

By the former statute it is enacted, that all persons shall well and truly set out and pay their small tithes, compositions, and agreements for the same, with all offerings, oblations, and obventions, to the several rectors, vicars, and other persons to whom they are due in their several parishes, according to the rights, customs, and prescriptions commonly used within the said parishes respectively; and if any person subtract or withdraw, or any ways fail in the true payment of such small tithes, offerings, or compositions, &c. by the space of *twenty days* at most after demand thereof, the person to whom the same shall be due may make his complaint *in writing* (the complaint must be in writing, or the order for nonpayment will be bad⁽¹⁾), to two or more justices of the peace within the county, place, or division, where they become due, neither of which justices is to be the patron of the church or chapel whence the said tithes arise, nor any ways interested in such tithes, offerings, oblations, obventions, or compositions aforesaid.

Justices to summon the party, determine the

Sect. 2. The justices, on such complaint, shall summon in writing under their hands and seals, by reasonable warning, every such person against

(¹) *Rex v. Furness*, 1 Str. R. 264.

whom any such complaint is made ; and after his appearance, or on default of appearance, the summons being proved before them upon oath, the said justices shall proceed to hear and determine the complaint ; and on the proofs, evidences, and testimonies produced before them, shall, in writing under their hands and seals, adjudge the case, and give such reasonable allowance and compensation for such tithes, offerings, &c. so subtracted or withheld, as they shall judge to be reasonable, and all costs and charges, not exceeding ten shillings, as upon the merits of the cause shall appear just.

complaint,
and give
costs.

Sect. 3. Any person refusing or neglecting, for the space of ten days after notice given, to pay such sum of money as on such complaint and proceeding shall by two or more justices of the peace be adjudged as aforesaid, in every such case the constables and churchwardens of the parish, or one of them, shall, by warrant under the hands and seals of the said justices to them directed, distrain the goods and chattels of the party so neglecting or refusing as aforesaid, and after detaining them by the space of three days, now altered by the 27 Geo. II. c. 20. not less than four, nor more than eight days, in case the said sum so adjudged, together with reasonable charges for making and detaining the said distress, be not tendered or paid by the said party in the mean time, shall and may make

On refusal to
pay in ten
days after
notice, con-
stables, &c.
may distrain.

public sale of the same, and pay to the party complaining so much of the money arising by such sale as may satisfy the said sum so adjudged, retaining to themselves such reasonable charges for making and keeping the said distress as the said justices shall think fit, rendering the over-plus (if any be) to the owner.

Justices to administer oaths.

Sect. 4. Justices of peace, in the examination of these matters, may administer oaths to any of the witnesses for the better discovery of the truth.

No complaint to be heard unless made within two years.

Sect. 6. No complaint concerning these small tithes, &c. to be heard and determined by the justices, unless made within the space of two years next after the time that the said tithes, &c. become due or payable.

Appeal from the justices to the sessions.

Sect. 7. Any person finding himself aggrieved may appeal to the next general quarter sessions to be held for that county or other division against any judgment given by such two justices; and the justices there, or the major part of them, shall proceed finally to hear and determine the matter, and to reverse the said judgment, if they shall see cause; and if they shall find cause to confirm the judgment given by the first two justices of the peace, they shall then decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be

Justices to give costs.

levied by distress and sale of his goods and chattels, as shall seem just and reasonable to them; and no proceedings or judgment had or to be had by virtue of this act shall be removed or superseded by virtue of any writ of *certiorari*, or other writ, unless the *title* of such tithes, &c. shall be in question,

Sect. 8, Provided, that where any person complained of for withholding any small tithes, &c. shall before the justices of the peace to whom such complaint is made, insist upon any prescription, composition, or *modus decimandi*, agreement, or title, whereby he ought to be freed from payment of the said tithes or other dues in question, and deliver the same in writing to the said justices subscribed by him, and shall then give to the party complaining reasonable and sufficient security, to the satisfaction of the said justices to pay all such costs and damages as, upon a trial at law to be had for that purpose in any of his majesty's courts having cognizance of that matter, shall be given against him, in case the said prescription, composition or *modus decimandi*, shall not upon the said trial be allowed; in that case the said justices of the peace shall forbear to give any judgment in the matter, and the person or persons so complaining shall be at liberty to prosecute such person or persons for their said subtraction, in any other court or courts whatsoever

Where persons insist on prescription, composition, &c.

where he might have sued before the making this act.

Judgment given by the justices to be enrolled at the next quarter sessions.

Sect. 9. Every person obtaining judgment, or against whom judgment shall be obtained, before any justice of the peace out of sessions by virtue of this act, shall cause or procure the said judgment to be enrolled at the next general quarter sessions for the county or other division; and the clerk of the peace shall upon tender thereof, enrol the same, and shall not receive for the enrolment of any one judgment any fee or reward exceeding one shilling; and the judgment so enrolled and satisfaction made by paying the sum adjudged, shall be a good bar to conclude the said rectors, vicars, and other persons from any other remedy for the said small tithes, oblations, obventions, or compositions for which the said judgment was obtained.

Justices may give costs not exceeding 10s.

Sect. 12. And the justices who shall hear and determine any of the matters aforesaid, shall have the power to give costs not exceeding ten shillings to the party prosecuted, if they find the complaint false and vexatious, to be levied in manner and form aforesaid.

Double costs.

Sect. 13. Provided, that if any person or persons shall be sued for any thing done in execution of this act, and the plaintiff in such

suit shall discontinue his action, or be nonsuit, or a verdict pass against him, that then, in any of the said cases, such person or persons shall recover double costs.

By stat. 7 and 8. W. III. c. 34. it is enacted, that where any Quaker refuses to pay or compound for his great or small tithes, or to pay any church rates, it shall and may be lawful to and for the two *next* justices of peace of the same county (other than such justice of the peace as is patron of the church or chapel where the said tithes do or shall arise, or anyways interested in the said tithes), upon the complaint of any parson, vicar, farmer, or proprietor of tithes, churchwarden, or churchwardens, who ought to have, receive, or collect the same, by warrant under their hands and seals, to convene before them such Quaker or Quakers neglecting or refusing to pay or compound for the same, and to examine upon oath (or affirmation in case of the examination of a Quaker) the truth and justice of the said complaint, and to ascertain and state the sum due; and by order under their hands and seals to direct and appoint the payment thereof, so that the sum ordered does not *exceed ten pounds*, now extended by the 53 Geo. III. c. 127. to any sum not exceeding *fifty pounds*; and, on refusal to pay according to such order, any one of the justices, by warrant under his hand and seal, may levy the

Suits for Quakers' tithes before justices of the peace.
7 & 8 W. III. c. 34.
53 Geo. III. c. 127. § 6.

money thus ordered by distress and sale, rendering the overplus to the person distrained upon, the necessary charges of the distress being first allowed by the said justice. Persons aggrieved may appeal to the next quarter sessions, who are finally to determine the matter, and reverse the said judgment, if they see cause; and if they shall find cause to continue the said judgment, they shall then decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be levied by distress and sale of the goods and chattels of the said appellant, as to them shall seem just and reasonable; and no proceedings or judgment had by virtue of this act shall be removed or superseded by any writ of *certiorari*, or other writ out of his majesty's courts at Westminster, or any other courts whatsoever, unless the title of such tithes shall be in question.

Sect. 5. provides, that in case any such appeal be made as aforesaid, no warrant of distress shall be granted until after such appeal be determined.

Of the summons and distress.

One justice is competent to receive the original complaint, and to *summon* the parties to appear before two or more justices of the peace, as in the act is set forth, but the *distress* is limited to one of the two *next* justices.

This act, intended for the benefit of Quakers, 1 Geo. I. c. 6. relates only to tithes and church rates; hence the 1 Geo. I. st. 2. c. 6. enacted that the like remedy shall be had against any Quaker or Quakers for the recovery of any tithes or rates, or any customary or other rights, dues, or payments belonging to any church or chapel, which of right, by law and custom, ought to be paid for the stipend or maintenance of any minister or curate officiating in any church or chapel; and any two or more justices of the peace of the same county or place (other than such justice as is patron of any church or chapel, or any ways interested in the said tithes), upon complaint of any parson, vicar, curate, farmer or proprietor of such tithes, or any churchwarden or chapelwarden, or other person who ought to have, receive, or collect any such tithes, rates, dues, or payments as aforesaid, are authorized and required to summon, in writing under their hands and seals, by reasonable warning, such Quaker or Quakers against whom such complaint shall be made; and after his or their appearance, or upon default of appearance, the said warning or summons being proved before them upon oath, to proceed to hear and determine the said complaint, and to make such order therein as in the aforesaid act is limited, and also to order such costs and charges as they shall think reasonable, not exceeding ten shillings, as upon the merits of the case shall appear

just, which order may and shall be so executed, and on such appeal, may be reversed or affirmed by the general quarter sessions, with such costs and remedy for the same; and shall not be removed into any other court, unless the titles of such tithes, dues, or payments shall be in question in like manner as by the aforesaid act is limited and provided.

SECTION IV.

On Issues.

Issues when granted.

ISSUES are directed by courts of equity merely to satisfy the conscience of the court.

Hence judges may model them into any shape — order evidence to be received not strictly admissible — send them for further investigation again and again, until satisfactory conclusions are arrived at — and on the other hand, if satisfied that the jury have drawn an equitable conclusion on the case, need not allow a new trial, although inadmissible evidence has been received by the judge at *nisi prius* without any order. ⁽¹⁾

(¹) The Minor Canons of R. 418. *Parsons v. Bellamy*,
St. Pauls v. Morris, 9 Ves. 4 Pr. R. 290. *Pemberton v.*
155. *Bullen v. Michel*, 2 Pr. *Pemberton*, 11 Ves. 53.

If a rector who has a *prima facie* title to the tithes of a parish *sues*, and a modus or any exemption is set up by the owner or occupier of lands against him, it is an established rule in courts of equity that the rector has a right to have the question tried on an issue, before a jury in a court of law. ⁽¹⁾

To a rector
suing.

This right, however, is not extended in favour of vicars, who are by no means entitled to issues as a matter of course. ⁽²⁾

Right not
extended to
vicars.

In questions between rectors and vicars, the former cannot claim an issue as a right, which is granted or not according to the instrument by which the vicar is endowed, or the proof adduced by him of perception, as founding a presumption of an anterior endowment. ⁽³⁾

As between
rectors and
vicars.

On the same principle, when there is one common law right opposed to another, and defendants satisfactorily prove their title to tithes by long enjoyments, grants, deeds, family settlements, old leases, or otherwise, a plaintiff relying entirely on his rectorial right, and producing no evidence to impeach the defendant's

Between dif-
ferent claim-
ants to tithes.

⁽¹⁾ Williams v. Price and others, 4 Pr. R. 156.

⁽²⁾ Per Richards, C. B. In Petch v. Dalton, 6 Pr. R. 239.

⁽³⁾ Per Richards, C. B. In

Dorman and others v. Curry and others, 4 Pr. R. 114. Parsons v. Bellamy, Cridland, and others, 4 Pr. R. 200. Petch v. Dalton, 6 Pr. R. 238.

case, is not entitled to an issue⁽¹⁾, which will not be directed where there is merely oath against oath; for the rule of equity is, that if the answer contains a positive denial to the case stated in the bill, and it is contradicted only by a single witness, there can be no decree against a defendant.

In uncertain matters, where facts disputed, that issues generally granted.

It is in uncertain matters of legal right — where there are reasonable doubts thrown on certain facts, such as the uniformity of alleged payments; customs sought to be established; farm moduses claimed; more than common law rights demanded, or fraud charged; that the conscience of the Court seeks for further information, and issues are in general granted.⁽²⁾

Thus a court will not decree in favour of a rector claiming tithes in kind of lands not within his parish, for which he has, during many years, received a money payment by way of composition, not insisted on by the defendant as a modus, without a previous enquiry at law on an issue, whether the plaintiff is entitled to any and what tithes as a portionist, his claim not being within

(¹) *Scott v. Airey*, Gwm. 1174. *Strutt v. Baker*, Gwm. 1430. *Barkerv. Baker*, Wight. R. 397. *Wilmot. Cl. v. Kelhly and others*, 1 Dan. R. 116. 5 Pr. R. 355. (²) *Drake v. Smith*, 5 Pr. R. 369. *Leathes v. Newitt*, 4 Pr. R. 355. *De Whelpdale v. Milburn*, 5 Pr. 485. *Bullen v. Michel*, 2 Pr. R. 399. *Travis v. Oxtan*, Gwm. 1066. *Morgan v. Neville*, Gwm. 1046. *Gwavas v. Kelynack*, Gwm. 691. *Boys v. Ellis*, Bunb. R. 139.

the recognized common law right of rector. ⁽¹⁾ So where one class of witnesses charge particular instances of fraud in setting out tithes, and another class meet these charges by general allegations of fairness, an issue probably would be directed. ⁽²⁾

All customs must be stated with accuracy and precision ⁽³⁾; and being in their nature entire, all the parts must be taken together, as a court cannot direct an issue to try part of a custom. ⁽⁴⁾ Customs must be stated accurately.

The evidence should accord with the pleadings, for if a modus is proved essentially different from what it is laid, courts will not grant issues. ⁽⁵⁾

Hence an issue will not be allowed to try a modus with a restriction or exception, where the defendants insist on a modus generally, and without any restriction or exception, as it would be to try a modus different from that which is made the ground of defence ⁽⁶⁾, although,

⁽¹⁾ Sanders v. Longden, 4 Pr. R. 117.

⁽²⁾ Evans and Shadock v. Green, Gwm. 1190.

⁽³⁾ Warren v. Fisher, Gwm. 1269.

⁽⁴⁾ Per Richards, C. B. in Leathes v. Newkt, 4 Pr. R. 370.

⁽⁵⁾ Bishop v. Chichester, Gwm. 1321. Vid. The Earl of Scarborough v. Hunter, Bam. R. 43.

⁽⁶⁾ Scott v. Fenwick, Gwm. 1252, 1253.

on the contrary, when a particular modus is not mentioned in a bill, nor particularly pleaded by the answer, yet, if a plaintiff's own witnesses show a reasonable ground for a modus, an issue will be directed to try it. ⁽¹⁾

Trial.

Where an issue is directed which a defendant may be desirous of trying, but which a plaintiff wishes to delay, the Court will permit the *former* to carry the record of an issue down to trial, on a suggestion, that the plaintiff intends to delay it ⁽²⁾; when, however, it is directed by a court of equity, and the record is brought down, the judge at nisi prius is as much in possession of it as of any other cause, and can put off the trial on a proper application. ⁽³⁾

Evidence.

It is not material on the trial of an issue directed by a court of equity, that the evidence extends to more closes than are stated in the pleadings ⁽⁴⁾, for being larger than is necessary it is enough. ⁽⁵⁾

Verdict.

Neither is the same strictness in the verdict required as in a court of law ⁽⁶⁾, though it must not be confused ⁽⁷⁾, nor with-

⁽¹⁾ Ekins v. Dormer, Gwm. 800.

⁽²⁾ Humpage v. Rowley, 4 T. R. 767. The Queen v. Sir Jacob Banks, 2 Salk. R. 652.

⁽³⁾ Buxton v. Lawton, 4 Camp. 163.

⁽⁴⁾ Taylor v. Walker, Bunb. R. 267.

⁽⁵⁾ Wood v. Budden, Hob. R. 119.

⁽⁶⁾ Richards v. Symes, 2 Atk. R. 319.

⁽⁷⁾ Stukeley v. Underhill, Hob. R. 113.

out the compass of the issue ⁽¹⁾, and a judge *Postea.* may indorse a different right from that alleged on the pleadings, if the jury find it without a special order for that purpose, for says Lord Mansfield, *valeat quantum valere potest.* ⁽²⁾

On a feigned issue directed by the Chan- *New trial.* cellor, the application for a new trial must be made in chancery, which is different from an action ordered by the Chancellor, as the application may then be either in chancery or in the court where the action is depending. ⁽³⁾

When there are several issues directed, and *Costs.* some are found for a plaintiff, and others for a defendant, although it is discretionary in the Court, the parties will usually be allowed costs apportioned according to the issues found in favour of each respectively. ⁽⁴⁾; but if a plaintiff withdraw the issues after they have been directed, he is liable to costs, as the weight of the expences attending issues should be considered before filing the bill. ⁽⁵⁾

When a feigned issue is ordered by a court of equity, the costs do not follow the verdict as a

⁽¹⁾ Tasker v. Salter, Hob. R. 112, 113.

⁽²⁾ Franklin v. Holmes, Gwm. 1229.

⁽³⁾ 2 Tidd's Pr. 883, and the cases there cited.

⁽⁴⁾ Prevost v. Benett and others, 2 Pr. R. 272.

⁽⁵⁾ Brookland v. Golding and others, Wight. R. 108.

matter of course, as is the case in a court of law; but the finding of the jury is returned back to the court which ordered the issue, and the costs are in the discretion of the Court.⁽¹⁾

(¹) 2 Tidd's Pr. 975. and the cases there cited.

CHAP. VI.

On the documentary Evidence relative to Tithes.

SECTION I.

On public documentary Evidence.

DOMESDAY Book, kept in the Court of the receipt of the Exchequer, in a place formerly called *Domus Dei*, and then for shortness Domesday, is the most ancient public document now in existence, and has always been considered a book of authority.

Domesday Book, begun in 1081, 14 W. I. finished in 1086.

It appears to have been known under the names of *Scriptura Thesauri Regis* — *Liber de Wintonia* — *Liber Regis* — and *Rotulus Regis*, was a general survey of all the lands in the kingdom, except those in the four northern counties, not comprehended in it on account of their uncultivated state, and describes the quantity and value of them in the time of Edward the Confessor, as well as at the period.

Known under different names.

of the survey, together with the names of the owners and their particular condition.

Classed
under dif-
ferent titles.

It was classed under different titles, that of *Terra*, comprehending the arable land; *Silva*, the wood; *Pastura*, the pasture; and *Pratum*, the meadow land sufficient for those oxen to live on which tilled the arable soil.

Particulars
entered by
verdict of
juries.

Commissioners, called King's Justiciaries, were appointed by King William, for the purpose of making the survey, and they entered every particular in their register by the verdict of juries.

Exact copies of some parts of Domesday Book, and extracts from others, will be found in the Harleian collection of manuscripts in the British Museum.⁽¹⁾

Calendarium
Rotulorum
Patentium,
3 John to
23 Ed. IV.
and Edw. V.
to 27 Geo. III.

The patent rolls, kept in the Tower, commence in the third year of King John, and end in the twenty-third year of Edward the Fourth. Those in the Rolls Chapel begin with a small roll of King Edward the Fifth, and are continued down to the twenty-seventh of George the Third.

(¹) 3 Holinsh. Chr. 13. Sax. Chr. A.D. 1086. Stowe's Chr. 118. Cam. Brit. clxii. Ingul. 79. 1 Inst. 83. a. n. 1. 4 Inst. 269. Anon. Hob. R. 188. Bul. N. P. 248. Hume's Hist.

E. ch. 4. Preface to Jones's Hist. Rec. xiii. 1 Reeve's Hist. Eng. 219. Rep. Com. on the Pub. Rec. in 1801 and 1812.

They contain grants of offices and lands, re-stitutions of temporalities to bishops, abbots, and other ecclesiastical persons, with confirmations of grants made to bodies corporate, as well ecclesiastical as civil. (¹)

The taxation of Pope Nicholas the Fourth, kept in the King's Remembrancer's Office, in the Exchequer, was finished in the nineteenth and twentieth years of Edward the First, to whom that Pope granted the tenths and first-fruits of all ecclesiastical benefices for six years, in order that the king might be better enabled to fulfil the promise he had made to the Pope, and proceed to the Holy Land.

Valor Beneficiorum of Pope Nicholas, began in 1288, finished for the province of Canterbury in 1291; for that of York in 1292.

All taxes paid to our Kings, and to the Popes, were regulated by this document, until the survey made in the twenty-sixth year of Henry the Eighth; it is therefore evidence, or a medium of proof affording an inference of the rate or value at which the persons employed thought fit at that time to estimate a living. (²)

All the statutes of the Colleges in our Universities which were founded before the Reformation, are also regulated by this criterion, according to which their benefices, under a certain

Statutes of colleges founded before the Reformation.

(¹) Rep. Com. Pub. Rec. 1812. Append. F. 3.

(²) Per Lord Redesdale, in Bullen v. Mitchell, 2 Pr. Rep. 477.

value, are exempted from the restriction in the statute twenty-first of Henry the Eighth, concerning pluralities. ⁽¹⁾

The estimate low.

In this valuation the church possessions were never estimated at too high a rate, and whatever imputation therefore may be cast upon it on general grounds, on that point it is universally allowed to be correct, and to be depended upon. ⁽²⁾

Taxation of Ireland.

There is also in the Court of Exchequer, at Westminster, a valuation and taxation of the whole of Ireland, made under the authority of Pope Nicholas the Fourth, which extends to the possessions of archbishops, bishops, rectories, vicarages, and every kind of ecclesiastical benefice. ⁽³⁾

Nonarum Inquisitiones, 15 Edw. III. 1341.

The Nonar rolls kept in the King's Remembrancer's office * are inquisitions returned to a commission for assessing the ninth part of the

⁽¹⁾ *Humphreys v. Knight*, Cro. Car. 456. *Ashby v. Power*, Gwm. 1238. Per Lord Eldon, in *Bullen v. Mitchell*, 2 Pr. R. 494. 2 *Holinsh. Chr.* 265. *Rep. Pub. Rec.* 1812. *Append. L.*

⁽²⁾ Per *Richards*, C. B. in *Boulton v. Richards and Booth*, 6 Pr. B. 489.

⁽³⁾ *Rep. Com. Pub. Rec.* 1812. *Append. L.*

* There are also copies of these rolls in Lincoln and Lichfield cathedrals.

value of sheaves, fleeces, and lambs throughout the kingdom.

King Edward the Third was empowered by act of parliament, to appoint commissioners in every diocese and deanery, to enquire into the real value of all ecclesiastical benefices, rectories, vicarages, and other property, who certified their proceedings under seal.

Commissioners appointed.

In these inquisitions the prelates, earls, barons, commons, and parishioners of every parish, stated on their oath the true value, sometimes separately, of the ninth of their sheaves, wool, and lambs, then the ancient tax of Pope Nicholas, and the circumstances which had produced an increase or decrease of value since that period.

Value of the ninths stated.

The latter part of the inquisition relates to "all those who dwell in forests and wastes, and all other that live not of their gain nor store, who by the good advice of them who shall be deputed taxers, shall be lawfully set at the value to the *fifteenth* without being unreasonably charged."

Some of the original inquisitions from whence the Nonæ rolls were formed, as well as the enrolments themselves, are now in the Exchequer, though they do not appear to have been transcribed into books. It should be also observed,

Kept in the exchequer.

that neither the book of Pope Nicholas's valor, nor the Nonæ rolls are so ample in many instances, as the returns from whence they were respectively formed.

These inquisitions are constantly used as evidence in tithe causes, and show the alterations which had taken place in the value of benefices and property, after an interval of fifty years, from the prior valuation of Pope Nicholas's taxation, as well as what the commissioners estimated the value of property at that period. ⁽¹⁾

Ecclesiastical Survey,
26 Hen. VIII.
1535.

The *Valor Beneficiorum*, instituted in the twenty-sixth year of Henry the Eighth, and kept in the office of the first-fruits, was made in consequence of the tenths and first-fruits of every ecclesiastical promotion being annexed to the crown. ⁽²⁾

Evidence,
but not con-
clusive.

This survey, though evidence of the amount of benefices at that time, and, according to Chief Baron Thomson, of great authority ⁽³⁾, is by no means conclusive ⁽⁴⁾, being constantly contra-

⁽¹⁾ Rep. Com. Pub. Rec. in 1801 and 1812. Append. L. Hume's Hist. Eng. ch. xv. 14 Ed. 3. st. 2.

⁽²⁾ Strype's Eccl. Mem. Hen. VIII. c. 29. p. 206. Stowe's An. 57.

⁽³⁾ In *Cunliffe v. Taylor*, 2 Pr. R. 335.

⁽⁴⁾ Per Richards, C. B. in *Drake v. Smith*, 1 Dan. R. 112. 5 Pr. R. 377.

dicted by contrary evidence⁽¹⁾, and is neither equivalent to an endowment nor to usage.⁽²⁾

There is no subject of ecclesiastical antiquity upon which writers have more differed than about the annual value of the possessions of the clergy at this period. The valuation, according to Hume, and others, was fixed much too high, as the sum comprehended revenues of all kinds, industry as well as lands, tenements, glebes, domains, rents, possessions, tithe-offerings, portions and other profits.⁽³⁾ On the other hand, there seems strong preponderating evidence, from whence we may conclude, that the monks were favoured, and it is probable that the commissioners who took the survey, rated property low, as had been done in the taxation of Pope Nicholas⁽⁴⁾, which valuation was about a third of the ecclesiastical survey.

Valuation
probably too
low.

This document is constantly admitted, for the purpose of showing the value of a rectory or vicarage at the time of the survey; or rather not of showing precisely what was the value, but what was the sum which the persons who

Constantly
used as evi-
dence of
value.

⁽¹⁾ *Tamberlaine v. Humphrey*, Gwm. 1345.

⁽²⁾ Per Richards, C. B. in *Armstrong v. Hewitt*, 4 Pr. R. 221.

⁽³⁾ Hume's *Hist. E. c.* 29.

in notis. Rep. Com. Rec. Pub. 1801 and 1812.

⁽⁴⁾ Preface to Tanner's Not. Mon. by Nasmith. *Chapman v. Smith*, Gwm. 856. *Ashby v. Power*, Gwm. 1240.

made the estimate adopted as the value, and therefore bearing such a proportion to the real value as that a jury may ascertain by inference what was the real amount. (1)

Court of
Augment-
ations,
27 Hen. VIII.
1536.

In the twenty-seventh year of Henry the Eighth, a judicial court was established under the title of the Court of Augmentations, for determining disputes that might arise respecting the lands and other possessions which had or might come into the hands of the crown, in consequence of the dissolution of monasteries — the seizure of the possessions of the knights templars — the surrenders of hospitals — or the forfeitures and vacancies of bishoprics, abbeys, and priories. And it was so called, because the revenues of the crown were much augmented by the suppression of the said houses.

This was a court of record with a seal; besides the chancellor of the court of augmentations, there was a treasurer, attorney, solicitor, several auditors and receivers, with clerks and other necessary retainers to a court.

The bailiff's, reeve's, or minister's accounts, were accounts of these and other possessions belonging to the crown, rendered by them annu-

(1) *Bullen v. Mitchell*, 2 Pr. R. 477. *Boulton v. Richards and Booth*, 6 Pr. R. 469. | *Kennicott v. Watson*, 2 Pr. R. 250. *Sir F. Cunliffe v. Taylor*, 2 Pr. R. 333.

ally to the auditors of the crown; and as the court of augmentations was dissolved by act of parliament (not printed) in the first year of Queen Mary, the possessions having been granted away, the records were declared to be the records of the court of exchequer, and the ministers or accountants of the crown soon after ceased to make their annual returns on separate rolls, but gave in their accounts of the estates of the crown, however acquired, in rolls for each county. (¹)

Court dissolved, first Queen Mary.

Surveys of the church and crown lands were taken by commissioners in the time of the Commonwealth, under the authority of the ordinances of parliament.

Parliamentary surveys, 1649 and 1650.

Copies of these surveys are deposited in many of the cathedrals, others in the augmentation-office, and the library of Lambeth-palace, and as the originals were lost in the great fire of London, copies are admissible in evidence, provided they come from unsuspected repositories. (²)

Copies, where deposited.

These parliamentary surveys were taken with great accuracy, and, according to Lord Kenyon,

Their accuracy and weight.

(¹) 4 Inst. 122. Rep. Pub. Rec. 1801 and 1812. 1 Inst. 159. a. n. 4. 4 Reeves's Eng. L. 257.

(²) Bullen v. Mitchell, 2 Pr. R. 399. Underhill v. Durham, Gwm. 542.

have been considered as *conclusive* evidence, the persons who then held the reins of government, and seized the church lands, wishing to make the most of them. ⁽¹⁾ If, therefore, they are silent as to a supposed *modus*, it is strong evidence against its existence ⁽²⁾, but, according to Chief Baron Richards, by no means conclusive; for, says that learned judge, “as to the fact of the parliamentary survey not referring to the *moduses*, there is nothing in that, when opposed to the proof of actual payment. Had that document (although it is certainly entitled to great respect on some questions,) even stated, that there was no *modus*, it would not, as being on that subject, *res inter alios acta*, be strong enough to overpower the positive evidence of actual payment, still less is the mere omission to mention it sufficient.” ⁽³⁾

“The parliamentary survey,” says Lord Ellenborough, “stands very high in estimation for accuracy; it has happened to me to know several instances in which the extreme accuracy of the commissioners who drew it up, has exceeded any thing which could have been expected.” ⁽⁴⁾

⁽¹⁾ Doe d. Powell v. Harcourt, K. B. Sittings after E. T. 39 Geo. III. Peak. Ev. Append. lxxv.

⁽²⁾ Roe d. Johnson v. Ireland, 11 East. R. 284.

⁽³⁾ Driffeld v. Orrell, 6 Pr. R. 330.

⁽⁴⁾ Roe d. Johnson v. Ireland, 11 East. R. 283. Driffeld v. Orrell, 6 Pr. R. 324.

As the pope was formerly the supreme head of the church, and had the disposition of all spiritual benefices, with the same power in spiritual matters that any other inferior ordinary enjoyed, licences from him, even unaccompanied by the king's licence, are admissible as evidence, and sufficient evidence of an impropriation. ⁽¹⁾

Licences
from the
pope and
pope's bulls.

For the same reason, a pope's bull has been admitted in evidence, to show that a particular monastery had a special exemption from the payment of tithes ⁽²⁾ and an exemplification under the bishop's seal is sufficient evidence of the pope's bull. ⁽³⁾

Inquisitions of office, if regularly taken, are always admissible in evidence, though not conclusive. ⁽⁴⁾

Inquisitions
under seal
of exchequer.

Thus an inquisition, taken by virtue of a commission which issued in the reign of Queen Elizabeth, directing commissioners to enquire whether a prior was seized of certain lands as parcel of a manor, and whether the crown was seized of them after the dissolution of the

⁽¹⁾ Cope v. Bedford, Palm. R. 427. Ward v. Britton, Gwm. 330.

⁽²⁾ Lord Clanricard's case, Palm. R. 37.

⁽³⁾ Cited in Hardr. R. 118.

⁽⁴⁾ Faulder v. Silk and others, 3 Campb. R. 126.

priory, has been held good, though not conclusive evidence of these facts. ⁽¹⁾

**Inquisitions
post mortem.**

Inquisitions post mortem, though not properly classed under the head of public documentary evidence, are in like manner admissible in evidence. ⁽²⁾

They were taken by virtue of writs directed to the escheators, of each county or district to summon a jury on oath, who were to enquire what lands any person died seised of; by what rents or services the same were held; who was the next heir; of what age he was, that the king might thereby be informed of his right of escheat or wardship; and the quantity, quality, and value of the lands the tenant died seised of. They are often the best evidence of the possessions of vacant bishoprics, vacant abbies and priories of royal foundation, descents of families, and of the extent, survey, and valuation of manors.

Those preserved in the Tower commence with the early part of Henry III. and end with the third year of Richard III. Others will be

⁽¹⁾ Tooker v. The Duke of Beaufort, 1 Burr. R. 146. | ten, Str. R. 308. The King, Lessee of the Earl of Thanet,

⁽²⁾ Burridge v. The Earl of Sussex and others, Ld. Raym. R. 224. | v. Foster, Sir Thomas Jones, R. 224.

R. 1292. Leighton v. Leigh-

met with in the Rolls' Chapel and the King's Remembrancer's Office. In the former there is a series of them, from the reign of Edward the First to the reign of Charles the First. (*)

These ancient documents, which have been treated of, are distinguishable in their nature from the other documentary evidence which remains to be considered, inasmuch as they are stamped with the sanction of public authority, were made in furtherance of the views of the supreme heads of the church or state, and the persons charged with making them had no individual interest to misrepresent the statements they contain, further than that of being favourable to the interests of those by whose authority they exercise their functions.

Observations on this kind of public documentary evidence.

The comparative weight ascribable to them may be collected from the observations under each particular head, so that in case of their conflicting, the reliance which is to be placed on each, may be best estimated.

Comparative weight of each.

In general these ancient documents are only *prima facie* evidence, requiring usage, or some other confirmation, without which indeed they

In general requires usage.

(*) Rep. Com. on Pub. Rec. | Mad. Hist. Exch. c. 10.
pub. in 1801 and 1812. 2 Bl. | Hardcastle v. Sclater and
Com. 66. 68. 3 Bl. Com. 258. | others, Gwm. 787.

are rarely considered conclusive in tithe questions.⁽¹⁾ When supported, however, to a certain extent by usage, considerable weight attaches to instruments of this nature.

Thus the ecclesiastical survey is admissible to prove an ancient endowment, and aided by perception of small tithes, though not of all small tithes, will give a vicar a right to tithes of articles of modern introduction against the lessee of the rector. ⁽²⁾ So, the same survey, stating a vicar to be entitled to tithe-hay in the parish *generally* will supply the absence of proof of perception from particular lands ⁽³⁾; and, indeed, parol evidence of enjoyment of agistment tithe for fifty years, directly contradictory to the ecclesiastical survey, which survey agreed with the usage proved prior to that period, has been held to be merely an usurpation on the ancient right. ⁽⁴⁾ In like manner, clear documentary evidence of the existence of an ecclesiastical rectory, in support of a rector's title, and proof of performance of ecclesiastical duties is sufficient to establish the right of a rector to tithes, against perception by the patron of the advowson, who also, by documentary evidence,

⁽¹⁾ Drake v. Smyth, 5 Pr. R. 369. Chapman v. Smith, Gwm. 856.

⁽²⁾ Cunliffe v. Taylor, 2 Pr. R. 329.

⁽³⁾ Armstrong v. Hewitt, 4 Pr. R. 216.

⁽⁴⁾ Vicar of Kellington v. Trin. Coll. Camb. 1 Wils. R. 170.

proves himself entitled to a sum of money in respect of the tithes arising within the parish, and a general non-perception of tithes by any former ecclesiastical rector. (1)

Such being the effect of this species of documentary evidence, the mode of establishing it must be next considered.

Mode of establishing this kind of documentary evidence.

All the abovementioned documents made under the direction of the public, for the purpose of determining the rights of the public, or of the sovereign, or head of the church, liable to be called for by several persons at the same time, and therefore confined to a particular spot, are proveable by examined copies.

Proved by examined copies.

If an inquisition be offered in evidence, it is necessary to ascertain the jurisdiction of the persons under whose authority it was taken.

Thus, if it be an inquisition *post mortem*, the commission under which it is taken must be produced; but this is not required where the issuing of the commission is notorious, as the commission of Henry VIII. for enquiring into the value of livings, or an inquisition taken by order of Cromwell's government, to ascertain

(1) Boulton v. Richards, 6 Pr. R. 483.

the lands belonging to the prebend of a monastery. (1)

SECTION II.

On Private Documentary Evidence.

~~Former~~
decree, ver-
dict, or judg-
ment,

THE next class of documentary evidence relates to proceedings which have originated, or documents which have been supplied by persons interested.

A decree, sentence, verdict, or judgment on the same matter in issue is admissible evidence between the same parties and their privies in blood, as the heir, privies in estate, as the feoffee, lessee, or remainder-man, privies in law, as tenant by curtesy, tenant in dower, the incumbent of a benefice, or persons claiming under them, on the ground that the parties in the cause participated in the transactions, had opportunities of examining into the facts, cross-examining the witnesses, contradicting any false statements, or correcting any errors which might have been made as to their rights. (2)

(1) *Peake's Ev.* 91. *Bul. N.* P. 328.

(2) *Jefferies v. Dyson*, 2 Str. R. 960. *Green v. Waller*, Ld. Raym. R. 891. *Phillips* on Ev. 317. *Outram v. More-*

wood, 5 East: 346. *Lady Dartmouth v. Roberts*, 16 East. 334. *Locke v. Norbonne*, 3 Mod. R. 142. *Bishop of Lincoln v. Sir W. Ellis*, Gwm. 632.

The principle indeed is, that as between the successors of two persons clothed with the *entirety* of the conflicting interests, a decree in a suit instituted by the one against the other would be *conclusive*. When, however, both or either have only a *partial estate* in such interests, it will not be conclusive, whether it be adduced in favour of the person standing in the situation of such partial owner or against him.

When conclusive and otherwise.

Thus, a decree for or against a preceding parson or former occupier, in respect of the same lands, is evidence, whatever might have been his estate in the land, and whether the present occupier claim under him or not ⁽¹⁾, or a decree for or against a lessee of a rectory, in suits with the vicar, is admissible evidence for or against subsequent proprietors of the rectory in suits with subsequent vicars, ⁽²⁾ In such cases the lessee had only a partial interest, and so has likewise the vicar. In order to make the evidence conclusive the then owner of the rectory should have had a fee-simple, and the owners of the fee-simple in the vicarage should have been parties, or, in other words, the ordinary and patron of the vicarage. Moreover,

⁽¹⁾ *Trevie v. Chaloner*, Gwm. 1238. *Foster v. Jackson*, Hob. R. 53. 3 Atk. R. 626, *Benson v. Olive*, Bunb. R. 284. Gwm. 701.

⁽²⁾ *Carr v. Heaton*, Gwm. 1261, Gwm. 632.

courts of equity require all the proper and necessary parties to a suit before they feel themselves concluded by a former decree or verdict, and the first question that arises is, whether all the necessary parties were before the court at the time the decree was made. If they were not, such judicial proceeding is by no means conclusive; hence a decree professing to establish customs of tithing, and modes of payment, some of which are obviously illegal moduses, but founded on agreements not ratified by the ordinary and patron, and not on a *bonâ fide* adverse suit to establish the moduses, but pronounced in a cause to which the patron and ordinary were not parties, is neither conclusive nor binding on the church or the court. (¹)

Must be
pleaded in
bar, by way
of estoppel.

Secondly, although a judgment or decree directly upon the point in issue, determining the rights of the parties, is conclusive, it must be pleaded in bar by way of estoppel, to prevent a question that has been tried and decided from being agitated a second time, as evidence to impeach it may otherwise be produced (²); and a former decree or verdict, in favor of a predecessor, is not conclusive in support of a

(¹) *Jenkinson v. Royston*,
5 Pr. R. 495.

(²) *Vooght v. Winch*, 2
Barn. & Ald. R. 662. *Minor*
Canons of St. Paul's v. Crick-

ett, Wight. R. 30. *Outram*
v. Morewood, 3 East. 346.
Pritman v. Pritman, 1 Vern.
R. 310.

plaintiff's case, if ever since that decree and verdict the succeeding rectors have neglected to take advantage of the result of the suit, and received the same money payments as before. (1)

But if there is no opportunity of pleading an estoppel, as in debt on the statute for not setting out tithes, where the plea is *nil debet*, it is *presumed* a jury who are never bound by estoppel must receive evidence to impeach it. And it should be observed, that a judgment at law is no estoppel in equity. (2)

A former bill in a court of equity between a rector and an occupier may be used in a cause, if the lands are ascertained to be the same (3), but it is only evidence to show that such a bill existed, and that certain facts were in issue between the parties in order to let in the answer or depositions of the witnesses (4), and is not admitted as evidence in courts of law to prove any facts either alleged or denied in the bill. (5)

An answer to a bill, being on oath, is evidence

Former bill
in equity.

Answer.

(1) Sanders v. Longden,
4 Pr. R. 117.

(2) Pierce v. Johns, Bunb.
R. 11.

(3) Ashby v. Power, Gwm.
1239.

(4) Per Ld. Kenyon, in Doe
d. Bowerman v. Sybourn,
7 T. R. 3.

(5) Case of the Banbury
Peerage, 2 Sel. N. P. 685.

against the party who made it, and all those claiming under him. (1)

Thus in an answer by a former rector to a bill filed to establish a modus of a certain measure of meal, as to one farm; which answer admitted that the parish was exempt in consideration of a commutation for meal, is not only admissible, but strong evidence to prove a parochial modus. (2) So an answer to a bill in the Court of Exchequer, on a claim of tithe-hay, by a vicar, against the rector and others, occupiers of lands in the parish, is evidence, in an action by a succeeding rector for not setting out the tithes, against the defendant who claims under one of those occupiers, and it is equally admissible in evidence, although a decree is not shown to have been made in the suit. (3)

An answer cannot be given in evidence without producing the bill, because without a bill, there does not appear to be a cause depending; but if there be proof by the proper officer, that the bill has been diligently searched for in the office and cannot be found, then the answer may be read. (4)

(1) *The Earl of Sussex v. Temple*, 1 Ld. Raym. R. 311.
The Countess of Dartmouth and others v. Roberts, 16 East. R. 334. *Goodright v. Moss*, Cowp. R. 594.

(2) *De Whelpdale v. Milburn*, 5 Pr. R. 425.

(3) *Lady Dartmouth v. Roberts*, 16 East. R. 334.

(4) *Gilb. Ev.* 49.

Depositions in an old cause are not, in general, admissible in evidence without proof both of the bill and answer, unless they are so old that neither the bill, answer, nor decree, are forthcoming, and it is proved that they have been in vain searched for ⁽¹⁾, as well as that the depositions taken in the former cause, were between the same parties, or their privies, related to the same lands, and that the same question was in issue. ⁽²⁾ No person however can benefit by depositions in an old cause who would not have been prejudiced had they gone the other way ⁽³⁾, nor can they be read unless issue was joined in the former cause. ⁽⁴⁾

Depositions
in former
cause.

As these instruments are, in some degree, of a public nature, and proceedings in courts of justice, they are proveable by examined copies, as the originals cannot be removed from place to place ⁽⁵⁾, it is sufficient that the paper produced agrees with what the officer of the court read as the

Proved by
examined
copies.

⁽¹⁾ *Byam v. Booth*, 2 Pr. R. 234. *Illingworth v. Leigh*, Gwm. 1615. *Rex v. Countess of Arundel*, Hob. R. 112. *Cazenove v. Vaughan*, 1 M. & Sel. 4.

⁽²⁾ *Morgan v. Neville*, Gwm. 1046. *Bertie v. Beaumont*, 2 Pr. R. 312. *Barkerv. Baker*, Wight. R. 397. *Coke v. Fountain*, 1 Vern. R. 413. *Scott*

v. Allgood and others, Gwm. 1369.

⁽³⁾ *Rushworth v. Countess of Pembroke*, Hard. R. 472.

⁽⁴⁾ *Baker v. Sweet*, Bunb. R. 91.

⁽⁵⁾ *Lady Dartmouth v. Roberts*, 16 East, 341. *Jones v. Randall*, Comp. R. 17. *Man v. Cary*, 3 Salk. 155. *Lynch v. Clarke*, 3 Salk. 154.

contents of the record, and not necessary for the persons examining to change papers and read them alternately. ⁽¹⁾

Ecclesiastical terriers.

Ecclesiastical terriers are surveys of the temporal rights of the clergyman in every parish, made by virtue of the eighty-seventh canon, which directs them to be kept in the bishop's register's office ⁽²⁾; and they became terriers by being thus restored to the bishop. ⁽³⁾

Their legitimate repositories.

The three legitimate repositories of terrier's, rector's, and vicar's books are the registry of the bishop of the diocese, the registry of the archdeacon, and the church chest ⁽⁴⁾, from whence the originals themselves must be brought as according to a late case, copies of *lost* terriers are inadmissible in evidence. ⁽⁵⁾

When brought from these repositories, terriers are of the highest order of evidence in tithe

⁽¹⁾ Rolf v. Dart, 2 Taunt. R. 52.

⁽²⁾ Repert. Canon. Append. 12. Per Macdonald, C. B. Miller v. Foster, Warw. S. Ass. 1794. Gwm. 1406.

⁽³⁾ Potts v. Durant, 3 Anst. R. 789. Gwm. 1450.

⁽⁴⁾ Armstrong v. Hewitt, 4 Pr. R. 216.

⁽⁵⁾ Leathes v. Hewitt, 4 Pr. R. 364. Sed vid. contra, Atkins v. Hatton, Bart. Gwm. 1406. where a copy from the parish registry was admitted, as the original could not be found. 2 Anst. 386.

causes ; ecclesiastical records made to be preserved *in rei perpetuam memoriam*, instruments of as solemn a nature as any that can be produced against those signing them, and almost paramount to usage ⁽¹⁾, but not conclusive. ⁽²⁾ “ I never saw any terrier,” says Richards, C. B. “ which mentioned the tithes of particular articles as being payable, unless the tithes of those “ articles were payable in kind.” Indeed when they record tithes to be payable for certain articles *speciatim*, they are presumptive proof of such tithe being payable in kind, or where they state any fact concerning the *mode* of rendering the tithe, such statement is evidence of that fact, and is allowed to qualify the render and in a great measure to define its legal character. ⁽³⁾

But unless a terrier does come from one of these sources, it cannot, in general, be admitted in evidence, although the rule is sometimes relaxed where the custody is satisfactorily explained. Rule sometimes relaxed.

Thus a terrier found in the registry of the dean and chapter of Litchfield, was admitted to be evidence against one of the prebendaries,

<p>⁽¹⁾ Per Richards C. B. Drake v. Smith, 5 Pr. R. 380.</p> <p>⁽²⁾ Blundell v. Maudsley, 15 East's R. 641. Lake v. Skinner, 1 Jac. & Walk. R. 20.</p>	<p>⁽³⁾ Drake v. Smith, 1 Dan. Rep. 114. Halse v. Eyston, 4 Pr. R. 419.</p>
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for here there was a proper connexion between the terrier and the place where it was found, and the terrier was found annexed to an old lease of the prebend of nearly the same date. ⁽¹⁾

Must be signed by churchwarden or some of the inhabitants.

A terrier is strong evidence against a parson, but never admitted for him, unless signed by a churchwarden, or (if the churchwardens are nominated by him) by some of the substantial inhabitants of the parish, and it need not necessarily be signed by the ministers of the parish ⁽²⁾, unless produced against a rector or vicar, when such signature would probably be necessary. ⁽³⁾

Thus on a bill filed by a vicar against the impropiator of a rectory for agistment tithe, a terrier was given in evidence on the part of the vicar signed only by the churchwardens. It was objected to, on the ground that it was not a terrier because made by the churchwardens alone, and not signed by the vicar; and secondly, that even supposing it to be a proper terrier, yet it could not be admitted in that cause against the rector, not being signed by any person claiming under, or on the part of the rector. The Court, however, held the terrier

⁽¹⁾ *Miller v. Foster*, Gwm. 1453.

⁽²⁾ *Bull. N. P.* 248. *Earl Cl. v. Lewis*, Cor. Heath J. *Essex A.* 1801. *Drake v.*

Smith, 5 Pr. R. 380. *Illingworth v. Leigh*, Gwm. 1615.

⁽³⁾ Per Wood, B. in *Mytton v. Harris*, 3 Pr. R. 24.

admissible, and said that such imperfect terriers were now uniformly received, being signed by persons uninterested, whose duty it was officially to sign it, and that the want of the vicar's signature made it stronger evidence in favour of his successor. ⁽¹⁾ So old terriers recording that tithe of hay is payable in kind, signed by the rector, churchwardens, overseers, and some of the resident parishioners, are good evidence to rebut the presumption of a farm modus, attempted to be established by proof of a money payment having been uniformly rendered within living memory, in the absence of any evidence even of reputation that the tithe had ever been taken in kind from the farm; and that although such terriers are not proved by any person interested in the farm. The Court in such a case will not grant an issue. ⁽²⁾

Entries of the receipts of ecclesiastical dues, made in the book of a deceased rector, are admitted in evidence for their successors ⁽³⁾, on the ground of an absence of all interest to mistate the facts, which could not possibly be evidence for themselves, and the want of any connection between them and their succes-

Entries in
books of de-
ceased rec-
tor.

⁽¹⁾ Illingworth v. Leigh, Gwm. 1615.

⁽²⁾ Mytton v. Harris, 3 Pr. R. 19.

⁽³⁾ Doe d. Brune v. Rawlings, 7 East's R. 290. Doctor Bennett v. Trepass, Gwm. 641. Bunb. R. 143.

sors. ⁽¹⁾ Thus, an old receipt given by a former rector, in the hands of a defendant, for a money payment in lieu of tithes, where there was a probability that it had come to him from an ancestor of the same name, is admissible evidence to support a *modus* ⁽²⁾, but such receipt, even if more than fifty years old, when offered to be put in to prove a money payment, purported by it to have been received in lieu of tithes is not admissible, and sufficient to establish the defence of a *modus*, unless there is other subsidiary evidence, such as who the parties to the receipt are—whether they are living or dead, in what character they stand, whether as agents, collectors, or otherwise, whether persons acting under authority or not, and whether there is reasonable evidence to show that it comes from the proper repository. ⁽³⁾

This principle is extended even to lay impropriators, although the latter reason fails ⁽⁴⁾, as well as to lessees of a rectory. ⁽⁵⁾ But rectors' books cannot be proved *vivâ voce* in courts of equity, for the rule is, that nothing shall be proved *vivâ voce* that requires more than the

⁽¹⁾ Legross v. Levemoor, Gwm. 529.

⁽⁴⁾ Bertie v. Beaumont, 2 Pr. R. 303.

⁽³⁾ Manby v. Curtis, 1 Pr. R. 225.

⁽⁴⁾ Anon. Bunb. 46. also cited in note in Gwm. 1618.

⁽⁵⁾ Illingworth v. Leigh, Gwm. 1615.

proof of handwriting to substantiate it, or that admits of cross-examination; and leave to put off a cause in order to prove them by interrogatories has been refused. ⁽¹⁾

In like manner, books of accompts and memoranda of a deceased vicar are evidence for his successor ⁽²⁾, and may be produced to show that money payments, received in lieu of tithes, are founded on, and regulated by a criterion not in existence beyond legal memory ⁽³⁾; or a receipt for payment (by a person sued by a vicar for tithes) of the plaintiff's bill of costs, is evidence of the suit having resulted in favour of the vicar, as well as an entry to that effect in a former vicar's book. ⁽⁴⁾ So a memorandum entered by a former vicar, in an old book called a parochial register, and kept in an iron chest at the vicarage, is admissible evidence on behalf of the vicar, such custody being proper for such a book which is common property ⁽⁵⁾: and an ancient survey of a prebend, entered in a manuscript book found in the registry of the dean and chapter of the diocese, enumerating what species of tithe belonged to the prebendary as rector, and what to the vicar, is admissible in

Books of
deceased
vicar.

⁽¹⁾ *Lake v. Skinner*, 1 Jac. & Walk. R. 15. *Greaves v. Budsel*, 1 Atk. R. 444.

⁽²⁾ *Lord Arundel's case*, Gwm. 620.

⁽³⁾ *Walter v. Holman*, 4 Pr. R. 171.

⁽⁴⁾ *Parsons, v. Bellamy*, 4 Pr. R. 190.

⁽⁵⁾ *Drake v. Smyth*, 5 Pr. R. 369.

evidence. ⁽¹⁾ On the other hand, an entry in a parish register of different moduses, the sum total of which is cast up in the writing of a deceased vicar, is admissible evidence against his successors; and papers delivered by the son of a deceased rector to the successor's attorney, as old parish documents, are sufficiently identified by the attorney, without calling the son. ⁽²⁾ When the place from whence these and similar documents is judged unsuspicious, another enquiry is to be made, whether the writer is alive, as, in that case, his entries are then no evidence; he must be called to prove that he has received the sum stated, unless indeed they are of such great antiquity that he may be fairly supposed to be dead. ⁽³⁾

Books of old collector, steward, or lessee.

Books of former collectors of ancient date found in the hands of their successors ⁽⁴⁾, or entries by a deceased steward of a former owner of the estate, containing an account of payments to a vicar in lieu of the tithes of particular lands, are admissible evidence against an impropriator in a suit by him. ⁽⁵⁾ In like manner, where a question arose between an impropriate rector

⁽¹⁾ *Garnons v. Barnard*, R. 229. *Jones v. Waller*, Gwm. 1462. Gwm. 847.

⁽²⁾ *Earl Clerk v. Lewis*, ⁽⁴⁾ *Jones v. Waller*, Gwm. 4 Esp. R. 1. Cor. Heath. Ess. 847. A. 1801.

⁽³⁾ *Mahly v. Curtis*, 1 Pr. ⁽⁵⁾ *Woodnorth v. Lord Cobham*, Bunb. R. 180.

and a vicar respecting agistment tithe, the court of exchequer held, that the books of the lessee of the rectory, stating the receipt of such tithe, were evidence, after the lease, to support the claim of the impropiator, as neither the lessee nor his assignee could have beneficially availed themselves of them.⁽¹⁾ But a valuation of tithes made by a surveyor at the request of a rector, with reference to money payments reputed to have been made in lieu of the tithes, is not evidence to fix a rector with an acknowledgment of such money payments, unless it be distinctly proved that the payments were expressly communicated to the surveyor by the rector, as the criterion of his valuation, and therefore adopted by the rector.⁽²⁾

First, It may be observed generally of these written documents, that, if the parties are dead, their writing must be proved either by a person who has seen them write, or has been in the habit of corresponding with them. If parties are dead their writing must be proved.

But when the writing carries with it its own testimony of antiquity, proof of handwriting does not seem more necessary at such a distance of time, than to prove a deed of the same Where the writing carries proof of its antiquity.

⁽¹⁾ *Illingworth v. Leigh*, | ⁽²⁾ *Bertis v. Beaumont*,
Gwm. 1618. | 2 Pr. R. 310.

date. (1) Where, however, the custody of the instrument is not sufficiently satisfactory alone to presume the handwriting of the parties, and the distance of time is such, that persons living cannot themselves either have seen them write, or had any direct means of making themselves acquainted with their signatures, a secondary mode of proof is said to be admissible, and an inspection of other old writings regularly preserved is perhaps allowed, whereby the similitude of the hand-writing may be compared, as being the best evidence the nature of the thing will permit. (2) It is by no means clear, however, that evidence of this description is, in strictness of law, receivable, and if it is, it is too loose for either judges or juries to give it any weight. (3)

The custody from whence they are produced.

Secondly, The custody from whence these documents are produced, is a most material circumstance in considering their admissibility. All documentary evidence of this nature must be accompanied by proof of the custody from

(1) Per Curiam, in *Wynne, Bart. v. Tyrwhitt*, 4 Barn. & Ald. 376. Per Thomson, C. B. in *Bertie v. Beaumont*, 2 Pr. R. 309. *Rex v. Inh. of Ryton*, 5 T. R. 259. *Dean and Chapter of Ely v. Stewart*, 2 Atk. R. 44.

(2) *Bul. N. P. 236. b. Randolph v. Gordon*, 1 Dan. R. 90. *Phillips on Ev.* 4 Ed. 524. *Goodtitle dem. Nevett v. Braham*, 4. T. R. 497. *Rex v. Cator*, 4 Esp. 117.

(3) *Gurney v. Langlands*, 5 Barn. and Ald. R. 330.

whence the party derived it, to satisfy the court of its authenticity ; and if no such proof is given, it will not be permitted to be read : whereas, when evidence of this nature is produced from the natural and proper depositories, found among the muniments of an estate, rectory, or vicarage, accredited by those in whose favour it could not have been used, there is a strong presumption that it has been fairly obtained, was properly reserved for use, and is free from all taint or suspicion of dishonesty. (¹)

Hence ancient entries made by the monks of an abbey, relating to an endowment of a vicarage, are good evidence (*quantum valeant*) of their subject matter, although such entries are mixed with extraneous memoranda, and the book is not confined to subjects *ejusdem generis*—admissible, because found in the proper custody—in the possession of an owner who was so far connected with the abbey as to be possessed of some part of the former estates of the monastery, although no part of the estates were situated in the parish in which the question between the parties to the suit arose. (²) So a very old book, produced

(¹) *Randolph v. Gordon*, 5 Pr. R. 312. *Bertie v. Beaumont*, 2 Pr. R. 309. *Jones v. Waller*, Gwm. 847. *Roe d. Brune v. Rawlings*, 7 East, R. 289. *Swinnerton v. Mar-*

quis of Stafford, 3 Taunt. R. 91. *Armstrong v. Hewitt*, 4 Pr. R. 218.

(²) *Bullen v. Michell*, 2 Pr. R. 399.

from the registry of the diocese of Lincoln, appearing to be a collection of ecclesiastical notices, compiled by Hugo Wells, was proposed as evidence of a vicarage, (the book containing, *inter alia*, abstracts of various endowments of churches) Lord Chief Baron Richards yielded to the authorities in support of the admission of such evidence, and suffered the book to be read: ⁽¹⁾

Where the
custody is
insufficient.

On the other hand, when no connexion can be established so as reasonably to account for the custody in which these instruments are found, or where that custody is *merely private*, and unconnected with the subject matter, courts have never gone the length of admitting such papers in evidence.

Thus a grant to an abbey produced from the Bodleian Library, or an old grant to a priory, coming from the British Museum ⁽²⁾, Dugdale's *Monasticon Anglicanum*, and Camden's *Britannia* ⁽³⁾, have all been rejected when produced for the purpose of proving private and particular rights.

⁽¹⁾ Leonard v. Franklin, 4 Pr. R. 264. Vid. Halse v. Eytton, 4 Pr. R. 417. Hebdon v. Freeman, 4 Pr. R. 420. Ogle v. Lord Gower, 4 Wood's B. 245.

⁽²⁾ Swinnerton v. Marquis of Stafford, 3 Taunt. R. 91.

⁽³⁾ Stainer v. Burgesses of Droithwich, 1 Salk. R. 281.

CHAP. VII.

Of Tithes in London.

THE provision formerly made for the clergy in London was by offerings, oblations, and other casual duties which arose on marriages, christenings, and burials. ⁽¹⁾ It appears from the records in London, that an inhabitant occupying a house for which he paid twenty shillings rent, on every Sunday, and every apostle's day, the vigil of which was a fast, paid a halfpenny; or, if he paid but ten shillings rent, a farthing only was due, which amounted to about two shillings and sixpence in the pound; and sometimes indeed it was less, as when one of the apostles' days fell on a Sunday, when there was only a halfpenny or farthing paid for both. ⁽²⁾ *

Original provisions for the clergy in London.

In the several acts of the 27 H. VIII. c. 20. 32 H. VIII. c. 7. 2 and 3 Edw. VI. c. 13. and

⁽¹⁾ 30 Edw. III. c. 1. 38 | ⁽²⁾ Dunn v. Burrell, Gwm. Edw. III. c. 13. | 321.

* There were only eight apostles' days, the vigils of which were fasted.

7 and 8 Will. III. c. 6. it was enacted, that nothing therein should extend to the city of London, concerning any tithe, offering, or other ecclesiastical duty, in consequence of which, no alteration in the tithes of London was made by them. The rate tithes themselves were made originally probably in consequence of some immemorial payment, or a *modus decimandi*, for the land on which the respective houses were built; the continuation of the payment afterwards, by custom, rendering it a sort of rate tithe for the house itself (¹), for which, as has been observed, tithes are not of common right due.

Increased
by Thomas
Arundel,
archbishop
of Canter-
bury.

In consequence of the decreasing revenues of the clergy, Thomas Arundel, archbishop of Canterbury, obtruded on the citizens of London twenty-two more saints' days than were usual, and there was a perpetual struggle between the ministers and citizens of London in the court of Rome, and in the ecclesiastical courts, concerning the payment of these offerings, which now amounted to about three shillings and sixpence in the pound. Tithes were but seldom paid; the citizens of London, as might be expected, outwitted the poor parson; and the

(¹) Doctor Grant's case, 11 Rep. 15. Leifield v. Tysdale, Hob. Rep. 10.

clergy, as Degge says, arrived at a very low ebb, were compelled to apply to parliament. (¹)

Hence an order was made by the archbishop of Canterbury and other lords of the kingdom, in the time of King Henry the Eighth, for the payment of tithes, according to the rate of two shillings and ninepence in the pound, which order, about ten years afterwards, was established by act of parliament, when in the 37 Hen. VIII. c. 12. it was enacted, that the citizens and inhabitants of the said city and liberties, from thenceforth for ever, shall pay yearly, without fraud, or guile, their tithes to the parsons, vicars, and curates of the said city, and their successors for the time being, after the rate hereafter following; that is, to wit, of every 10s. rent by the year, of all houses, shops, warehouses, cellars, stables, and every of them, within the said city and liberty thereof, 16½d. and of every 20s. rent by the year 2s. 9d. and so above the rent of 20s. by the year, ascending from 10s. to 10s. according to the rate aforesaid.

37 Hen. VIII. c. 12. That every house, &c. of 10s. rent shall pay 16½d.; and of 20s. rent 2s. 9d. and so above in proportion.

Sect. 3. That where any lease is or shall be made of any dwelling-house or houses, shops, warehouses, cellars, or stables, or any of them, by fraud or covin, reserving less rent than hath been accustomed or is, or where any such lease

Houses, &c. leased without rent by reason of fines, shall pay tithe according to the last rent,

(¹) Degge, c. 25. 351. Vid. letter to Sir H. Yelverton in The Earl of Buckingham's 1617. 6 Bacon's Works, 189.

shall be made without any rent reserved upon the same, by reason of any fine or income paid before hand, or by any other fraud or covin; in every such case, the tenant or farmer shall pay for his tithes of the same, after the rate aforesaid, according to the quality of such rents as the same were last letten for, without fraud or covin, before the making of such lease.

Sect. 4. That every owner or inheriter of any dwelling-house or houses, shops, warehouses, cellars, or stables, inhabiting or occupying the same himself, shall pay after such rate, according to the quantity of such yearly rent as the same was last letten for, without fraud or covin.

Where more persons dwell in the same house, the first taker shall pay the tithe.

Sect. 5. If any person hath taken, or hereafter shall take any mease or mansion-place by lease, and the taker thereof, his executor or assigns, doth, or shall inhabit in any part thereof, and hath within eight years last past before this order, or hereafter shall let out the residue of the same; in such case the principal farmer or farmers, or first taker or takers thereof, their executors or assigns, shall pay their tithes after the rate aforesaid, according to the quantity of their rent, by the year.

But one person taking divers houses, &c.

Sect. 6. And if any person shall take divers mansion-houses, shops, warehouses, cellars, or stables in one lease, and shall let out one or

more of them, and shall keep one or more in his own hands, and inhabit in the same, the said taker and his executors or assigns shall pay their tithes after the rate abovesaid, according to the quantity of the yearly rent of such mansion-house or houses, retained in his hands; and his assignees of the residue of the said mansion-house or houses shall pay their tithes after the rate abovesaid, according to the quantity of their yearly rents.

shall pay for what he retains, and his assignees for the rest.

Sect. 7. If such farmer or farmers, or his or their assigns of any mansion-house or houses, warehouses, shops, cellars, or stables, hath at any time within eight years last past, or shall hereafter let over all the said mansion-house or houses contained in his or their lease to one or more persons, the inhabitants, lessees, or occupiers thereof shall pay their tithes after the rate of such rents as the inhabitants, lessees, or occupiers, and their assigns, have been or shall be charged withal, without fraud or covin.

Houses, &c. being united or divided, shall pay according to the accustomed proportion.

Sect. 8. If any dwelling-house, within eight years last past, was or hereafter shall be converted into a warehouse, storehouse, or such like, or if a warehouse, storehouse, or such like, within the said eight years, was or hereafter shall be converted into a dwelling-house, the occupier thereof shall pay tithes for the same after the rate above declared of mansion-house rents.

And so also if converted to other uses.

Where implements, cranes, &c. are let with workhouses of any kind, the third penny shall be abated.

Sect. 9. That where any person shall demise any dyehouse or brewhouse, with implements convenient or necessary for dyeing or brewing, reserving a rent upon the same, as well in respect of such implements, as in respect of such dyehouse or brewhouse, the tenant shall pay his tithes after such rate as is abovesaid, the third penny abated; and every principal house or houses, with key or wharf, having any crane or gibbet belonging to the same, shall pay after the like rate of their rents as is aforesaid, the third penny abated; and other wharfs belonging to houses having no crane or gibbet, shall pay for his tithes as shall be paid for mansion-houses in form aforesaid.

But shops, yards, &c. being united to a house, shall pay the full rent, if severed from it.

Sect. 10. That where any mansion-house, with a shop, stable, warehouse, wharf, with crane, timber-yard, teinter-yard, or garden belonging to the same, or as parcel of the same, is or shall be occupied together, if the same be hereafter severed or divided, or at any time within eight years last past were severed or divided; then the farmers or occupiers thereof shall pay such tithes as is abovesaid, for such shops, stables, warehouses, wharf with crane, timber-yard, teinter-yard, or garden aforesaid, so severed or divided, after the rate of their several rents thereupon reserved.

Tithes shall be paid quarterly.

Sect. 11. That the said citizens and inhabit-

ants shall pay their tithes quarterly ; that is to say, at the feast of Easter, the nativity of St. John Baptist, the feast of St. Michael the archangel, and the nativity of our Lord, by even portions.

Sect. 12. That every householder paying 10s. rent or above, shall, for him or herself, be discharged of their four offering-days ; but his wife, children, servants, or other of their family taking their rights of the church at Easter, shall pay 2s. for their four offering-days yearly.

Those paying 10s. exempt from quarterly payments.

Sect. 13. Provided always, and it is decreed, that if any house, which hath been or hereafter shall be letten for 10s. rent by year or more, be or hath been at any time within eight years last past, or hereafter shall be divided and leased into small parcels or members, yielding less yearly rent than 10s. by the year ; the owner, if he dwell in any part of such house, or else the principal lessee (if the owner do not dwell in some part of the same), shall pay for the tithes after such rate of rent as the same house was accustomed to be letten for before such division or dividing into parts or members ; and the under-farmers and lessees to be discharged of all tithes for such small parcels, parts, or members, rented at less yearly rent than 10s. by the year, without fraud or covin, paying 2d. yearly for four offering-days.

Any house of 10s. or above, being let into small parcels, tithe shall be paid according to that rate, by the owner or principal lessee.

Gardens for pleasures shall pay no tithe, but otherwise if for profit.

Sect. 14. Provided always, and it is decreed, that for such gardens as appertain not to any mansion-house, and which any person holdeth in his hands for pleasure, or to his own use, the person holding the same shall pay no tithes for the same; but if any person which shall hold any such garden containing half an acre or more, shall make any yearly profit thereof by way of sale, he shall pay tithes for the same after such rate of his rent as is herein first above specified.

And so if divided into less quantities.

Sect. 15. Provided also, that if any such gardens, now being of the quantity of half an acre or more, be hereafter, by fraud or covin, divided into less quantities, then to pay tithe according to the rate abovesaid.

This decree shall not extend to houses of noblemen, nor public halls.

Sect. 16. Provided always, that this decree shall not extend to the houses of great men or noblemen or noblewomen, kept in their own hands, and not letten for any rent, which in times past have paid no tithes, so long as they shall so continue unletten; nor to any halls of crafts or companies, so long as they be kept unletten, so that the same halls in times past have not used to pay any tithes.

Nor to sheds, stables, &c. distinct, and which have not paid any tithes.

Sect. 17. Provided always, and it is decreed, that this present order and decree shall not in anywise extend to bind or charge any sheds,

stables, cellars, timber-yards, nor teinter-yards, which were never parcel of any dwelling-house, nor belonging to any dwelling-house, nor have been accustomed to pay any tithes; but that the said citizens and inhabitants shall thereof be quit of payment of any tithes, as it hath been used and accustomed.

Sect. 18. Provided also, and it is decreed, that where a less sum than after sixteen-pence halfpenny in the 10s. rent, or less sum than 2s. 9d. in the 20s. rent, hath been accustomed to be paid for tithes; in such places the said citizens and inhabitants shall pay but only after such rate as hath been accustomed.

Where less than the aforesaid rates hath been customably paid, less shall continue to be paid.

Sect. 19. *Item*, it is also decreed, that if any variance, controversy, or strife shall arise in the said city for non-payment of any tithes; or if any variance or doubt shall arise upon the true knowledge or division of any rent or tithes within the liberties of the said city, or of any extent of assessment thereof; or if any doubt arise upon any other thing contained within this decree; then, upon complaint made by the party grieved to the mayor of the city of London for the time being, the said mayor by the advice of counsel shall call the said parties before him, and make a final end in the same, with costs to be awarded by the discretion of the said mayor

All controversies shall be determined by the lord mayor.

and his assistants, according to the intent and purport of this present decree:

Or (if the said mayor do it not in two months) by the Lord Chancellor.

Sect. 20. And if the said mayor shall not make an end thereof within two months after complaint to him made, or if any of the said parties find themselves aggrieved, the Lord Chancellor of England, for the time being, upon complaint to him made within three months then next following, shall make an end in the same, with such costs to be awarded as shall be thought convenient, according to the intent and purport of the said decree.

Lease being taken at a lower rent than usual by reason of ruins, &c. payment shall be made only according to such rent.

Sect. 21. Provided always, that if any person take any tenement for a less rent than it was accustomed to be letten for by reason of great ruin or decay, burning, or such like occasions or misfortunes; such person, his executors or assigns, shall pay tithes only after the rate of the rent reserved in his lease, and none otherwise, as long as the same lease shall endure.

Rate how assessed.

First, it may be observed, that the rate fixed by this statute on the rent of houses is to be assessed on the improved rent, and not according to the old rents as they were before the statute⁽¹⁾;

(¹) *Sheffield v. Pierce*, Gwm. 503. *Ivatt v. Warren*, Gwm. 1054. *Warden and Minor* | *Canons of St. Paul's v. Morris*, 9 Ves. 155.

and a rent for a half-year, and afterwards for another half-year, is a yearly rent, or rent by the year. ⁽¹⁾ So if the rents are continued as they were at the time of making the statute, though on new fines, the tithes are payable according to the rent at the time of the statute, even where the fines bear an appearance of fraud, as being payable yearly on the rent-days; but if on new fines less rent is reserved, or if neither rent nor fines are paid, the tithe is due according to the rent at the time of the decree ⁽²⁾; and where fraud is imputed, it is incumbent on those making the charge to shew the transaction fraudulent, or covenous. ⁽³⁾ Where new houses are built upon the site of old buildings, and continue in the occupation of the owner, the tithe is to be estimated upon the value, and not upon the rent of the old buildings, upon the site of which they are erected; indeed, even if the new house be erected on the site of a shed, or other buildings which before paid no tithe, it is liable under the statute. ⁽⁴⁾

Where there had been a custom to pay tithes according to a pound-rate before the statute, such Where there has been a custom.

⁽¹⁾ Meadhouse v. Taylor, Noy, 130. C. B. in Minor Canons of St. Paul's v. Crickett, 1 Dan. R. 48.

⁽²⁾ Degge, c. 25. 356. Skidmore v. Bell, 2 Inst. 659.

⁽³⁾ Per Baron Richards, ⁽⁴⁾ 1 Dan. Rep. 45. in notis; et vide cases there cited.

payments are still to be continued, as it was never intended to alter or enlarge, but to establish them. Thus, by the 18th sect., if there had been a payment of less sums by agreement between the parson and parishioners, they were confirmed by the statute, the design of which was to settle such customary payments and agreements, which have never been set aside or broken through, but have been ever since complied with. (1) So if there has been a customary payment, since the statute, of a less sum than two shillings and nine-pence in the pound, it may be good evidence to infer that such payment had such an existence as brings it within the description of a customary payment, according to the true intendment of the act (2), which customary payment must have been in existence at the time of the act. But where the payment of such less sums is insisted upon, it will be necessary for the parties so insisting to prove what specific sum is and has

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An entire exemption cannot be claimed.

Nevertheless, though such less sums are admissible as payments, an entire exemption cannot be here claimed. Thus, it is no defence to a

(1) *Bennet v. Trespass*, 2 Bro. P. C. 437. *St. Bride's v. Wilson*, Gwm. 635. in *notis.* *India Company*, 13 Ves. 9. Gwm. 640.

(2) *Warden and Minor Canons of St. Paul's v. Morris*, 9 Ves. 155.

(*) *Antrobus v. the East*

demand for tithes, that the house stands on the site of old houses which never paid tithe ⁽¹⁾, that it was part of the possessions of one of the greater abbeys ⁽²⁾, or that there never was nor is any rent paid by the occupier who is the owner, and therefore that there is no tithe due ⁽³⁾; for all houses are chargeable, except those specified in the statute. ⁽⁴⁾ So the privilege does not extend to the building when altered to another thing: thus, where a shed is converted into a warehouse, the exemption for the shed ceases. ⁽⁵⁾

So where a bill was filed, seeking payment at the rate of two shillings and nine-pence in the pound upon the annual value to be let of premises consisting of extensive warehouses in the occupation of the owners, which warehouses were erected upon the site of small tenements, some of which appeared by the answer to have been formerly occupied at low rents, and others where the rents were unknown; the Master of the Rolls* stated, that the proposition in the answer, that less payments than at the rate of

⁽¹⁾ Bramston v. Heron, Company. In Court of Exch. Gwm. 1314. East. T. 1805.

⁽²⁾ Green v. Piper, Gwm. 164. ⁽⁴⁾ Green v. Piper, Cro. El. 276.

⁽³⁾ Kynaston v. East India ⁽⁵⁾ Gwm. 1315.

Houses never
let.

two shillings and nine-pence in the pound having been accustomed to be paid, says nothing more than that the tithe has not been paid at the rate of two shillings and nine-pence in the pound. That is perfectly immaterial, unless you can shut out the claim to the full statutory tithe, unless you can show some specific customary payment that may be presumed to have had existence at the time the statute was made. These premises are not in lease ; no rent therefore is reserved ; all the property is in the occupation of the owners. Upon what is the payment to be ? The expression of the statute is, that every owner occupying himself shall pay after the quantity of such yearly rent as the same was last letten for without fraud or covin. The owner might say his house never was let ; and, therefore, there being no rent at which it was last let, it is not liable to any tithe ; and it is difficult upon this clause of the statute to maintain the claim of tithe of new houses occupied by the owners. Yet it seems strange that the rector, entitled to tithe for the old house, should lose his right to any tithe, merely because a new house has been built in its place, all other circumstances remaining precisely the same. The plaintiff contends, that, in cases in which none of the provisions of the statute apply, the rector's claim rests upon the first general enacting clause, making all houses, generally, liable to tithe. If the general object was to subject

all houses, particular words are to be construed so as to give effect to the general purpose. With reference to that, there is no reason for the distinction between houses let and not let, that has been suggested; great incongruity would arise from that, and the words are large enough to include both. The express exemption of some houses that never have been let, forcibly implies, that if that exemption were not expressed, all houses, whether let or not, would be liable; but then the difficulty occurs, that the payment is to be according to the rent; therefore, where there is no rent, no tithe is due; but, upon the whole, less violence is done to the statute by construing the word "rent" in different senses, as it is used in different clauses, than by holding all houses that never were in lease to be out of the statute.

But this is a difficulty with which I have not to encounter; for, in this respect, the construction is settled by decision; upon which, "rent" means either actual rent or estimated rent, with reference to the value, according to the statute to which it is applied; and in opposition to that, there is nothing but a dictum (of Lord Coke *)⁽¹⁾ where it was not the point in the

⁽¹⁾ 2 Inst. 660.

* It was formerly thought, that if a house was occupied by the owners, and consequently no rent paid, that not being within the decree, no tithe was due. — Degge, c. 25, § 56,

cause, that where houses were not let, that is *casus omissus*, and no tithe is payable. ⁽¹⁾ Hence the decree was made for payment at the rate of two shillings and nine-pence in the pound upon the value ⁽²⁾; not that the meaning is, that where there is a yearly rent, recourse shall be had to the value, but that the value is to be considered where there is no rent.

Such was the law relative to the clergy in London, when the fire in sixteen hundred and sixty-six consumed eighty-five churches, and laid the greater part of the city in ashes.

22 & 23
Car. II.

To remedy this calamity, an act was passed in the 22d and 23d of king Charles the Second, for the better maintenance of the parsons, vicars, and curates, in the parishes of the city of London burnt by the fire. Thirty-four of the churches demolished were not rebuilt, but annexed or united to others, and the salaries for the maintenance of the ministers of the remaining fifty, (the parish of St. Christopher having been united to the rectory of St. Margaret, Lothbury, by the 21 Geo. III. c. 71.) were fixed by an annual sum of money payable in lieu of tithes,

⁽¹⁾ Vid. *Ivart v. Warren*, Gwm. 1054. *Grant v. Cannon*, Gwm. 541. *Williamson v. Gosling*, Gwm. 902.

⁽²⁾ *Antrobus v. The East India Company*, 13 Ves. R. 9.

Ch. VII.] *relative to Tithes in London.*

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which is assessed by an equal pound-rate on the houses in the different parishes.

The sums fixed by this act, having been found incompetent for the maintenance of the clergy, a small, and, it is feared, far from sufficient relief, was afforded them by the stat. 44 Geo. III. c. 89. wherein it is enacted, that, instead of the annual tithes of all and every parish and parishes within the city of London, and the liberties thereof, whose churches were demolished, or in part consumed by the fire mentioned in the said recited act, the annual certain tithes, or sums of money in lieu of tithes, of and for the parish and parishes within the said city and liberties herein-after enumerated, shall, from and after the twenty-ninth day of September one thousand eight hundred and four, be as follows ; (that is to say)

Of the parish of Allhallows, Lombard-street, two hundred pounds.

Of St. Bartholomew, Exchange, two hundred pounds.

Of St. Bridget, *alias* Bride's, two hundred pounds.

Of St. Bennet Finch, two hundred pounds.

Of St. Michael, Crooked-lane, two hundred pounds.

Of St. Christopher and St. Margaret, Loth-

bury, three hundred and sixty-six pounds thirteen shillings and four-pence.

Of St. Dionis Backchurch, two hundred pounds.

Of St. Dunstan in the East, three hundred and thirty-three pounds six shillings and eight-pence.

Of St. James, Garlick-hythe, two hundred pounds.

Of St. Michael, Cornhill, two hundred and thirty-three pounds six shillings, and eight-pence.

Of St. Michael, Bassishaw, two hundred and twenty-eight pounds eighteen shillings and four-pence.

Of St. Mary, Aldermanbury, two hundred and fifty pounds.

Of St. Martin, Ludgate, two hundred and sixty-six pounds thirteen shillings and four-pence.

Of St. Peter, Cornhill, two hundred pounds.

Of St. Stephen, Coleman-street, two hundred pounds.

Of St. Sepulchre, three hundred and thirty-three pounds six shillings and eight-pence.

Of Allhallows, Bread-street, and St. John Evangelist, two hundred and thirty-three pounds six shillings and eight-pence.

Of Allhallows the Great and Allhallows the Less, three hundred and thirty-three pounds six shillings and eight-pence,

Of St. Alban's, Wood-street, and St. Olaves, Silver-street, two hundred and eighty-three pounds six shillings and eight-pence.

Of St. Anne and Agnes, and St. John Zachary, two hundred and thirty-three pounds six shillings and eight pence.

Of St. Augustine, and St. Faith, two hundred and eighty-six pounds thirteen shillings and four-pence.

Of St. Andrew Wardrobe, and St. Anne, Blackfriars, two hundred and thirty-three pounds six shillings and eight-pence.

Of St. Antholin, and St. John Baptist, two hundred pounds.

Of St. Bennet, Gracechurch and St. Leonard, Eastcheap, two hundred and thirty-three pounds six shillings and eight-pence.

Of St. Bennet, Paul's wharf, and St. Peter, Paul's wharf, two hundred pounds.

Of Christchurch, and St. Leonard, Forster-lane, three hundred and thirty-three pounds six shillings and eight-pence.

Of St. Edmund the King, and St. Nicholas Acons, three hundred pounds.

Of St. George, Botolph-lane, and St. Botolph, Billingsgate, three hundred pounds.

Of St. Lawrence Jury, and St. Magdalen, Milk-street, two hundred pounds.

Of St. Magnus, and St. Margaret, New Fish-street, two hundred and eighty-three pounds six shillings and eight-pence,

Of St. Michael Royal, and St. Martin Vintry, two hundred and thirty-three pounds six shillings and eight-pence.

Of St. Matthew, Friday-street, and St. Peter, Cheap, two hundred and fifty pounds.

Of St. Margaret Pattons, and St. Gabriel, Fenchurch, two hundred pounds.

Of St. Mary at Hill, and St. Andrew Hubbard, three hundred and thirty-three pounds six shillings and eight-pence.

Of St. Mary Woolnoth, and St. Mary Woolchurch, two hundred and sixty-six pounds thirteen shillings and four-pence.

Of St. Clement Eastcheap, and St. Martin, Orgars, two hundred and thirty-three pounds six shillings and eight-pence.

Of St. Mary Abchurch, and St. Lawrence Pountney, two hundred pounds.

Of St. Mary Aldermay, and St. Thomas Apostle, two hundred and fifty pounds.

Of St. Mary-le-Bow, St. Pancras, Soper-lane, and Alhallows, Honey-lane, three hundred and fifty-three pounds six shillings and eight-pence.

Of St. Mildred Poultry, and St. Mary Colechurch, two hundred and eighty-three pounds six shillings and eight-pence.

Of St. Michael, Wood-street, and St. Mary Staining, two hundred pounds.

Of St. Mildred, Bread-street, and St. Margaret Moses, two hundred and sixteen pounds thirteen shillings and four-pence.

Of St. Michael, Queenhithe, and Trinity, two hundred and sixty pounds thirteen shillings and four-pence.

Of St. Magdalen, Old Fish-street, and St. Gregory, two hundred pounds.

Of St. Mary Somerset, and St. Mary Mounthaw, two hundred pounds.

Of St. Nicholas Cole Abbey, and St. Nicholas Olaves, two hundred and sixteen pounds thirteen shillings and four-pence.

Of St. Olave, Jewry, and St. Martin, Ironmonger-lane, two hundred pounds.

Of St. Stephen, Walbrook, and St. Bennet, Sheerhogg, two hundred pounds.

Of St. Swythin, and St. Mary Bothaw, two hundred and thirty-three pounds six shillings and eight-pence.

Of St. Vedast *alias* Foster's, and St. Michael Quern, two hundred and sixty-six pounds thirteen shillings and four-pence.

Sect 2. Which respective sums of money, to be paid in lieu of tithes within the said respective parishes, shall be the respective certain actual annual maintenance (over and above glebes and perquisites, gifts, and bequests to the respective parson, vicar, and curate of any parish for the time being, or to their successors respectively, or to others for their use) of the said respective parsons, vicars, and curates, legally

The rate
tithes shall
be paid be-
sides glebes,
perquisites,
and bequests.

instituted, inducted, and admitted into the respective parishes aforesaid.

“ Power to make assessments on houses and other buildings before 21st August 1804, by the aldermen and common council, and church-wardens in such ward.”

Sect. 3. Appeal to the lord mayor and court of aldermen against assessments.

Sect. 4. Assessments may be altered every seven years.

Four transcripts thereof to be made by the assessors.

Sect. 6. And be it further enacted by the authority aforesaid, that the said assessors, within fourteen days after such assessment made, and the respective appeals (if any be) determined, shall make four transcripts thereof, in writing, containing the respective sums to be payable, or appointed to be paid, out of all and every the premises within such respective parish, and subscribe the same with their names, and within twenty days after such subscription as aforesaid, one of the said transcripts shall be returned to the lord mayor of the city of London, to be kept and preserved by the said lord mayor, in the town-clerk's office of the said city, for a perpetual memorial thereof; and another of the said transcripts shall be returned into the registry

of the lord bishop of London, to be kept and preserved as aforesaid ; and the other of the said transcripts shall remain and be kept in the vestry of such respective parish, for a perpetual memorial as aforesaid ; and the remaining transcript shall be delivered, within three days after such subscription, to the incumbent of such respective parish, and the said assessments shall continue in force, and be acted upon, until any new assessment shall be made in pursuance of this act.

The said sums shall be payable by quarterly payments on 25th December, 25th March, 24th June, and 29th September, every year. Sect. 7.

Sect. 8. And whereas, in certain of the parishes herein-before named, there are impropriations ; and the impropriators were, as herein-before is mentioned, directed to pay and allow what really and *bonâ fide* they had used, and ought to have paid and satisfied, to the respective incumbents of the said parishes before the said fire, which said payments were to be esteemed and computed as part of the maintenance of such incumbents ; be it further enacted, that in the parishes of Saint Bridget, otherwise Saint Bride's ; Saint Bennet Finch ; Saint Mary, Aldermanbury ; Saint Stephen, Coleman Street ; Allhallows the Less ; Christ Church ; Saint Lawrence, Jewry ; Saint Lawrence Poultry ; and Saint Mary Cole

Impropriators to continue to pay what they have been accustomed to pay.

Church ; the impropriators shall continue to allow and pay to the respective incumbents of the same parishes what they have been accustomed to allow and pay before and since the passing of the said recited act of the 22d and 23d years of the reign of King Charles the Second ; which said sums shall be paid to the incumbents of the same respective parishes, in part of the respective sums herein-before appointed to be the certain annual maintenance of the same respective incumbents.

The vicar of Saint Sepulchre's shall receive the full sum directed by this act, instead of one-third part of the impropriate tithes.

Sect. 9. And whereas two-third parts of the impropriate tithes of the parish of Saint Sepulchre are vested in trustees, in trust for the parishioners of that parish ; and the vicar of the said parish is endowed with the remaining third part of the said impropriate tithes ; be it therefore enacted, that the said vicar shall, from and after the twenty-ninth day of September one thousand eight hundred and four, receive the full sum directed by this act to be paid him for his maintenance in lieu of the third part of the said impropriate tithes, to which, by virtue of his endowment, he is entitled, from the several inhabitants of, or from, or out of, or for or in respect of the several houses, tenements, and other hereditaments, situate within that part of the said parish of Saint Sepulchre which lies within the liberties of the city of London, but

exclusive of and over and above the third part of the tithes to which he is entitled, from the inhabitants of, or from, or out of, or for or in respect of the several houses, tenements, or other hereditaments situate within that part of the said parish which lies within the county of Middlesex; and that from and after the said twenty-ninth day of September one thousand eight hundred and four, the said third part of the said impropriate tithes due from the inhabitants of or from, or out of or in respect of the several houses, tenements, or other hereditaments situate within that part of the said parish of Saint Sepulchre which lies within the said liberties of the city of London, shall cease and determine, and be no longer paid or payable.

For continuing certain compensations out of the city chamber, in lieu of houses taken down, &c. sect. 10. Money shall be recovered (in case of refusal of payment) by warrant of a magistrate, sect. 11. If the sums assessed shall be paid in manner after mentioned (see sect. 13.), they shall not be raised as before directed, sect. 13. Churchwardens, &c. may make yearly assessments, with appeal to court of aldermen, sect. 13, 14. Sums assessed by the churchwardens, &c. may be levied by warrant of a magistrate, sect. 15. If the monies to be assessed by the last-mentioned means shall be unpaid for thirty days after any quarterly day

of payment, the same shall be raised in the same manner as the first assessment, sect. 16. Quakers exempted from being collectors under this act, sect. 17.

Powers of
22 & 23
Car. II. and
the powers
of this act
vested in the
lord mayor
and court of
aldermen, or,
on their fail-
ure, in two
of the barons
of the Ex-
chequer.

Sect. 18. And be it further enacted, that all and singular the powers and authorities in and by the said recited act of the 22d and 23d years of King Charles the Second, given to and vested in the lord mayor and court of aldermen of the city of London, shall be, and the same are hereby from henceforth given to and vested in the said lord mayor and court of aldermen for the time being, for and in respect of all and singular the matters and things in this act contained, or by this act enacted, so far as the case is or shall be applicable; and that in case the said lord mayor and court of aldermen shall refuse or neglect to execute any of the respective powers to them by this act granted, or to perform all and every such things relating either to the assessing or levying of the respective sums aforesaid, as they are by this act authorized and required to perform, either expressly or by reference, that then it shall be lawful for any two or more of the Barons of His Majesty's Court of Exchequer, by warrant or warrants under their hands and seals, to do and perform what the said lord mayor and court of aldermen, according to the true intent and meaning of this act, might or ought to have done, and by such

warrant either to empower any person or persons to make the respective assessments as aforesaid, or to authorize the respective officers or persons appointed to collect such assessments, to levy the same by distress and sale of the goods of any person or persons that shall refuse or neglect to pay the same in manner and form aforesaid.

Sect. 19. Provided always, that no court or judge ecclesiastical or temporal, shall hold plea of or for any the sum or sums of money due or owing, or to be paid by virtue of this act, or any part thereof, other than the persons hereby authorized to have cognizance thereof; nor shall it be lawful for any parson, vicar, curate, or incumbent to convent or sue any person or persons assessed as aforesaid, and refusing or neglecting to pay the same, in any court or courts, or before any judge or judges, other than what are authorized and appointed by this act for the hearing and determining the same, in manner aforesaid.

No ecclesiastical court, &c. shall hold plea of or for monies payable under this act.

There are, in addition to the acts recited, particular statutes relative to particular churches in London.

Of particular churches.

The ecclesiastical court is seldom able to execute its jurisdiction over tithe causes in London; if accounts are necessary, in cases of fraud, if the

Power of the ecclesiastical court in tithe causes in London.

prosecution of the right depends upon matter of discovery, and, in all cases relative to *customary payments*, recourse must be had to another jurisdiction.

Jurisdiction
of courts in
Westminster
Hall over
tithes in
London.

An act of parliament creating a special jurisdiction never ousts the jurisdiction of Westminster Hall without special words. Hence, notwithstanding a remedy for the recovery of tithes is thus given before the lord mayor of London by the several statutes enumerated, as they have no negative words in them, and tithes being determinable *ab antiquo*, as it is said, in the Court of Exchequer, that court, as well as the Court of Chancery, has an original jurisdiction over tithes in London. (1)

(1) *Langham v. Baker*, 1223. Warden and Minor Hard. R. 116. 3 Com. Dig. | *Canons of St. Paul's v. Crick-*
Tit. Dis. M. 13. Gibs. Cod. | ets, Gwm. 1425.

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